

Pakistani Copyright Laws: An Analytical Study in Islamic Perspective



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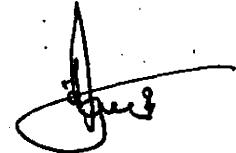
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SUBJECT: APPROVAL TO SUBMIT THESIS FOR VIVA-VOCE EXAM

It is hereby intimated that Zainab Javed student of LLM Islamic Commercial Law has completed her research thesis under my supervision. I have read whole final copy and I am satisfied with the research completed by the student. Her topic of research was: “Pakistani Copyright Laws: An Analytical Study in Islamic Perspective”. I allow her to submit her thesis for viva-voce exam.



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IN THE NAME OF ALLAH THE MOST MERCIFUL AND BENEFICIENT

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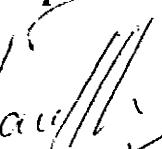
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Abstract

The first copyright legislation came with Statue of Anne in 1710 and now almost all the countries in the world have their own copyright legislation and are also part of international copyright conventions. Though being widely legislated-ever since its emergence-the legality of the copyright has been disputed among academicians and violated by common men. As the issue is only three centuries old, therefore it has not been discussed by the *fuqaha*. However its legality under *Shariah* has been discussed by number of contemporary Islamic scholars. Most of the credible and well known contemporary sources like OIC Fiqh Academy, Federal Shariat Court of Pakistan and scholars like Justice Taqi Usmani, Fatih al Duryani, Dr. Whaba al Zuhayli, Sheikh Abdul Aziz bin Baz and many others have justified copyright laws. The core study of thesis was to accumulate and analyze the arguments of proponents. Unfortunately arguments advanced for justifying copyright laws from Islamic perspective are highly inadequate. Most of the arguments revolve around justifying that it is permissible in *Shariah* to take benefit from something intangible but copyright is not just right to sell but it is an exclusive right that stop others from taking benefit from the same object. Proponents have not addressed the issue of exclusive right. Another widely used argument is that copyright has become prevalent custom. However statistics show that in Pakistan it is otherwise. Also proponents after terming copyright as property have not addressed why copyrighted objects are not treated as property. Limited nature of copyright, issue of terming infringement of copyright as theft or not, and zakatability of copyright are also some of the issues left unaddressed. As long as copyright is not legalized by giving convincing argument the issue will remain open to debate and vast majority of law abiding Muslim citizens in Pakistan and in the rest of the world will keep on preferring buying cheap pirated versions instead of the original one.

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INTRODUCTION

After the advent of printing, the first copyright legislation was drafted. Prior to that copyrights and intellectual creations were not treated as property or there was no specific laws to protect them as rights. It was not only because prior to the printing era no need was felt to protect them as there was no wide spread circulation but also due to its unique features. Copyright are different from the property that had legal protection at that time (physical property). As most of them can only be possessed by a single person at a time. For example when a person possesses or use a pen then nobody else can use or possess it while it is in his use or possession. However a piece of writing or song can be read again and again by several persons at the same time without reducing other persons use¹ and also by zero marginal cost². Moreover, the unauthorized taking of copyright material does not feel like theft. Stealing a physical object involve depriving the lawful owner of the object taken-possession as well as personal use, whereas stealing a copyrighted material only deprives the lawful owner of potential profit.³ Therefore treating copyright as property and legal entity opened the way of legal debates in the Western and the Muslim

¹ Brian Martin, "Against intellectual property", 3.

http://www.ire.pw.edu.pl/~cpsp/dz_dydak/eeareathens/img/4%20Martin%201995%20-%20Against%20intellectual%20property.pdf

² Edwin C. Hettinger, "Justifying Intellectual Property", *Philosophy and Public Affairs*, Vol.18, No.1, (Winter, 1989), 34.

³ Ibid, 35.

world. However arguments advanced for justifying copyrights from Islamic perspective are highly inadequate. Not only the proper methodology has not been used by many of its proponents but also many of the controversial aspects of copyright law have not been discussed by not taking copyright laws in its totality. Many of the proponents of copyright⁴ from Islamic perspective have justified it by terming it prevalent culture but there is need to substantiate the justification if it is really a prevalent culture. Moreover after terming copyright as property it has not been explained by its proponents why it has not been treated as property. Property in Islam is perpetual but copyright terminates after a specific time period after the death of creator or author. There are fixed punishments for theft in Islamic law but these punishments are not applied for infringement of copyrighted material even if unlawful profit exceeds the limit of *nasab*. Under Islamic law there is system of deducting *Zakat* from property after certain conditions are met. Is there any system of deducting *Zakat* from copyrighted goods if it meets the conditions? That needs to be determined.

Whatever are the arguments of proponents and opponents, the reality is copyrights now plays a pivotal role in the growth of developed nations economies so a question arise if copyright laws should be justified under the doctrine of *maslaha*. However answer to this should not be a generalized one and a thorough research on economic grounds of particular jurisdiction needs to be done.

Thesis is divided into five chapters. It's very important to have conceptual framework of copyright laws before proceeding towards its legality⁵. Therefore first chapter of the thesis is about the basic concept of copyright laws and its historical evolution. Second chapter explains the nature of copyright; it also discusses in particular copyright legislations in Pakistan and different treaties to which it has become part.

⁴ especially those in Pakistan and subcontinent.

⁵World Intellectual Property Organization, *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*, (Geneva:2003),13,

www.wipo.int/copyright/en/publications/.../copyright_pub_893.pdf

Nonetheless copyright laws are more or less same all around the world because of international treaties and conventions.

Third chapter covers the fundamental concepts related to copyright under Islamic law. These are the concept of property, right and sale. It is important to clarify these concepts before preceding towards arguments as many of these concepts form the basis of the arguments. Fourth chapter discusses the arguments of proponents and opponents of copyright from Islamic law perspective along with analysis of the arguments of proponents.

Fifth chapter is about the effects of copyright laws under Islamic law. Legal status of author, printer, publisher, distributor and translators are discussed. It also deals with Zakat on copyrighted goods, punishments for infringement of copyrighted goods and limited nature of rights.

CHAPTER 1

COPYRIGHT LAW: AN INTRODUCTION

1.1 Definition of Copyright

In the literal sense, copyright is derived from the Latin word *copia*, that means plenty or to make plenty.⁶ Copyright is composed of two distinct words, namely, Copy and Right. Copy is defined in 'The Concise Oxford Dictionary' as: "A thing made to imitate or be identical to another; or single specimen of a publication or issue; or a matter to be printed, or a material for a newspaper or magazine article, or the text of an advertisement; or a model to be copied, or a page written after a model."⁷

Copy has been defined in 'Cambridge International Dictionary of English' as "to produce something so that it is the same as (an original piece of work), or to behave, dress, speak etc. in a way that is intended to be someone else". It is also

⁶ Peter Newman, ed., *The new Palgrave dictionary of economics and the law*. vol.1. (UK: Macmillan Reference Limited, 1998) , s.v. "copyright"

⁷ Della Thompson, ed., *The Concise Oxford Dictionary*, 9th ed. (Oxford: Clarendon Press, 1995), 296.

defined as "written text which is to be printed, or text which is intended to help with the sale of a product"⁸.

Copy according to Black's law dictionary is an imitation or reproduction of an original⁹.

According to Wharton law lexicon it is "the transcript or double of an original writing."¹⁰

Section 2 (ha) of The Copyright Ordinance 1962 states that copy includes "any material object in which a work is fixed by any method and from which the work can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."¹¹

Right is defined in a numeral ways in Cambridge Dictionary. It is defined as correct, suitable; morally acceptable; direction; a position that is opposite of left; healthy, exactly or directly. Right in politics having traditional opinion, and believing in low taxes, private ownership of property, business and industry and less help for the poor, right is also used as part of the title of particular people.¹² Similarly numbers of definitions of right are found in Oxford Dictionary but the meaning that is closer is "a thing one may legally or morally claim".¹³ According to Advanced Law Lexicon it is a term "which a man is

⁸ Cambridge International Dictionary of English (U.K: Cambridge University Press, 1999), s.v "copy"

⁹ Bryan A. Garner, ed in chief., *Black's law dictionary* , 7th ed. (St. Paul: West Group, 1999), 337.

¹⁰ A.S Oppe, *Wharton's law lexicon* (Karachi: Nazir Press, 1976), s.v. "copy"

¹¹ Inserted vide section 2 of the Copyright (Amendment) Act, 1992.

¹² Cambridge Dictionaries Online, "Cambridge Advanced Learner's Dictionary", Cambridge University, <http://dictionary.cambridge.org/results.asp?searchword=right&x=17&y=9> (accessed May 15, 2009).

¹³ Della Thompson, ed., *The Concise Oxford Dictionary*, 9th ed. (Oxford: Clarendon Press, 1995), 1185.

entitled to have or to do, or to receive from others, within the limits prescribed by law."¹⁴

Various Jurists and writers have also defined right and legal right. Some of the definitions are as follows. According to Hibert a right is:

One person's capacity of obliging others to do or forbear by means not of his own strength but by the strength of a third party. If such third party is God, the right is Divine.

If such third party is public generally acting through opinion, the right is moral. If such third party is the State acting directly or indirectly, the right is legal.¹⁵

Hofeld, Dr. Dean, Sir Fredrick Pollock and Sir John Salmond state their view that nature of a legal right cannot be explained without explaining the nature of legal duty.¹⁶ Salmond defined right as an "interest recognized and protected by a rule of right. It is an interest respect of which is a duty and the disregard of which is a wrong".¹⁷

However according to Dr. Holland the immediate and main purpose of the law is the creation of rights.¹⁸ He defines right as "a capacity residing in one man of controlling, with the assent and the assistance of the State, the action of others."¹⁹

¹⁴ P.Ramanatha, ed., *P. Ramanatha Aiyar's Advanced Law Lexicon*, 3rded, vol.4 (India: Wadhwa and Company Nagpur, 2007), 4140.

¹⁵ V.D. Mahajan, *Jurisprudence and legal theory* (Lahore: Irfan Law Book House, n.d), 286.

¹⁶ A duty is an act that is required. It is an obligatory act. A breach of duty is wrong. For further reading see also Imran Ahsan Nyazee, *Jurisprudence* (Islamabad: Institute of Advanced Legal Studies), 213-34 and P.J.Fitzgerald, *Salmond on Jurisprudence* (Lahore: Mansoor Book House, 2003), 106-23.

¹⁷ The infringement of right is always a wrong.

¹⁸ M. Farani, *Jurisprudence*, (Lahore: Lahore Law Times Publications, n.d), 91.

Three centuries ago, from copyright law's beginning, technical definition of copyright was same as that of its literal meaning: the right to make copies and to forbid others from doing the same without one's permission. It meant simply written work.²⁰ However now it is not just right to make copy but it has been extended to granting new rights²¹ and new subject matter.²²

Copyright has been defined by Cambridge Advanced Learner's Dictionary as "the legal right to control the production and selling of a book, play, film, photograph or piece of music."²³

It has been defined in Black's law dictionary as: "a property right in an original work of authorship (such as literary, musical, artistic, photographic, or film work) fixed in any tangible medium of expression , giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work."²⁴

Wharton's Law Lexicon has defined it as "an incorporeal right , being the exclusive privilege of printing, reprinting, selling and publishing his own original work which the

¹⁹ Dr. V.D. Mahajan, *Jurisprudence and legal theory* (Lahore: Irfan Law Book House, n.d), 286.

²⁰ Paul Goldstein, *Copyright Highway 3* (1994), quoted in P. Ramanatha Aiyar's *Advanced Law Lexicon* and *Black's law dictionary*.

²¹ Right of distribution, public performance, adaptation, translation, broadcasting, etc (details of these rights are given in the later part of this chapter).

²² Now it has been extended from musical compositions to digital technology and multimedia forms.

²³ Cambridge Dictionaries Online, "Cambridge Advanced Learner's Dictionary", Cambridge University Press, <http://dictionary.cambridge.org/define.asp?key=17095&dict=CALD> (accessed May 15, 2009).

²⁴ Bryan A. Garner, ed in chief., *Black's law dictionary* , 7th ed. (St. Paul: West Group, 1999), 337.

statute law first gave to an author in 1709, by 8 Anne, c.19, for the term of fourteen years.²⁵

According to WIPO's booklet "the expression copyright refers to the main act which, in respect to literary and artistic creations, may be made only by the author or his authorization. The act is making copies of the work."²⁶

According to Section 3 of Copyright Ordinance 1962:

'copyright means the exclusive right

a) in the case of a literary, dramatic or musical work, to do and authorize the doing of any of the following acts, namely:-

to reproduce the work in any material form;

to publish the work;

to perform the work in public;

to produce, reproduce, perform, or publish any translation of the work;

to use the work in a cinematographic work or make a record in respect of the work;

[to broadcast the work, or to communicate the broadcast of the work to the public by a loudspeaker or any other similar instrument;]²⁷

to make any adaptation of the work;

to do in relation to a translation or an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (vi);

[to authorize the rental of computer programmes;]²⁸

²⁵ A.S Oppe, *Wharton's law lexicon* (Karachi: Nazir Press, 1976), s.v. 'right'

²⁶ *Understanding Copyright and related rights* (Switzerland: WIPO Publications, n.d), 5,

http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf (accessed 5 May, 2009).

²⁷ Substituted vide section 3 of the Copyright (Amendment) Act 1992.

b) in the case of an artistic work , to do or authorize the doing of any of the following acts namely:-

- i. to reproduce the work in any material form;
- ii. to publish the work;
- iii. to use the work in a cinematographic work
- iv. to show the work in television;
- v. to make any adaptation of the work;
- vi. to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (vi);

c) in the case of a cinematographic work, to do or authorize the doing of any of the following acts, namely:-

to make a copy of the work;

to cause the work in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public;

to make any record embodying the recording in any part of the sound track associated with the work by utilizing such sound track;

[to broadcast the work;]²⁹

[to authorize the rental of the cinematographic works;]³⁰

d) in the case of a record, to do or authorize the doing of any of the following acts by utilizing the record, namely:-

to make any other record embodying the same recording

to use the recording the sound track of a cinematographic work;

²⁸ Added vide section 3 of the Copyright (Amendment) Ordinance, 2000.

²⁹ Substituted vide section 3 of the Copyright (Amendment) Act 1992.

³⁰ Added vide section 3 of the Copyright (Amendment) Ordinance, 2000.

speeches and took them to Sicily to sell them.³⁵ Nevertheless, authors were unanimous in condemning those who sought to appropriate or plagiarize³⁶ their work. For example the poet Martin, in one of his epigrams, regarding his work as his children, calls one who steals his verses a plagiarus (plagiarist), a kidnapper.³⁷

Moreover, also in other ancient civilizations -like Chinese, Christians, Jewish and Islamic- ideas or their expression were not thought to be owned by humans. Writing for profit was despised in Chinese Confucian thought. Though trading in books thrived in China as soon as 11th century but it was only the physical substance- the paper and ink of book or manuscript- that was the subject of sale and not the ideas and expressions themselves. As wisdom and character were considered to be natural and were not capable of being claimed by anyone.³⁸

The Judeo-Christian tradition glorified knowledge as something God gifted. As in the New Testament, in the passage of the Book of Mathew, Jesus urges his disciples in the

³⁵ Stephen M. Stewart, *International Copyright and Neighbouring Rights*, (London: Butterworths, 1985), 14.

³⁶ In fact, 'the expression plagiarism is taken from the "lex Fabia". *Lex Fabia* is 'the law which deals with what we would call today kidnapping , then the stealing of slaves or children'; Stephen M. Stewart, *International Copyright and Neighbouring Rights* ,14.

³⁷ Marital Epigrams I, 52, quoted in Stephen M. Stewart, *International Copyright and Neighbouring Rights*, 14.

³⁸ Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, 27.

to cause the recording embodied in the record to be heard in public;
 to communicate the recording embodied in the record by [broadcast]³¹

1.2 Historical Evolution of Copyright

Ancient Greeks assumed knowledge and its expression to others as a gift of God. Generally, it was not thought of as saleable commodity.³² As according to Plato "all ideas were held from birth in the mind". Thus the ancient academic libraries were not given on sale but were succeeded as gift by the teacher to the most worthy one.³³ Greek and Roman writers did not take writing or authorship as profession or source of earning. Socrates and Plato regarded themselves as teachers. Caesar was politician, Cicero was advocate and Catullus was a public servant. Still, however there were few instances when writers' piece of writing was sold. Cicero praised Atticus³⁴ for having splendidly sold his speeches and offered him all his future work for publication. On the other hand Hermodorus generally got the contempt when he wrote up his teacher Plato lecture and

³¹ Copyright Ordinance 1962.

³² Though a copyist labor could be bestowed and prizes for author were granted .

³³ Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, Vol.131, No.2, On Intellectual Property (Spring, 2002):26

³⁴ In modern times Atticus would have been called the publisher of Cicero.

following words “Freely ye have received, freely give”³⁹ Selling gift of God was considered as religious sin. The doctors, lawyers, professors and judges were told not to get remuneration from their work, although they were allowed to get presents in appreciation.⁴⁰

Also, in the Middle Ages, authors only desired the widest possible distribution, and not to commercialize their work. However, they were aware of the paternity claim and moral rights of the author. Once Saint Columba copied his teacher named Abbot Finnian’s Psalter without his permission when he paid visit to his monastery. Finnian was very cross and referred to King Dermott. He demanded the return of the copy. Columba pleaded that he was going to propagate the faith by widely circulating it. The King ruled in favour of the Abbot-the author- by stating: “to every cow her calf and consequently to every book it’s copy.”⁴¹

China was the first known country to have ordinance regulating publication. As early as in Tang dynasty, the emperor Wen-tsing in 885 A.D prohibited almanacs to be published privately. An exclusive managing structure around printing industry was formed around Sung dynasty (960-1179). Important cities were established with state printing houses and special government concessions for sensitive literature were materialized. Private printing house could receive an exclusive privilege by registering

³⁹ Holy Bible 10:8.

⁴⁰ Carla Hesse, “The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance”, *Daedalus*, 28.

⁴¹ Stephen M. Stewart, *International Copyright and Neighbouring Rights*, (London: Butterworths, 1985), 14.

particular work with Imperial Officials. However these privileges were not a form of property rights. These were mere grace, extended and revoked at the will of the authorities. In fact they were created to protect emperor's prerogatives and interests.⁴²

Similar structure of privileges was created by European empires, city states and monarchies with the new invent of printing in the 1450s. In Europe the first move was made in 1469 by the Republic of Venice, when John Speyer was accorded the absolute privilege to print the epistles of Cicero and Pliny in the dominion of Venetia for a term of 5 years⁴³. This exercise of imparting absolute monopoly by rulers then spread rapidly across the Italy, and then to France and England.

The first initiative in England occurred in 1504 AD when the title of 'Kings Printer' was given to William Facques, by giving him exclusive right to print different royal documents.⁴⁴ By 1557 the "Stationers Company" of London, a publishers association was authorized by the crown to grant charters or licenses to print⁴⁵ and without license it was prohibited to print books for sale in Great Britain. This was done by the authorities to

⁴² Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, 29-30.

⁴³ Brander Matthews, "Evolution of Copyright", *Political Science Quarterly*, Vol. 5, No. 4 (Dec., 1890), 583-602, 588.

⁴⁴ Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, 30.

⁴⁵ Gavin Mc Farlane, *A practical introduction to copyright*, (London: Waterlow Publishers, 1989), 2.

keep tract of the heretical authors⁴⁶ and to prevent the propagation of Protestant reformation.⁴⁷ The Company had the power to make by laws until they are not against the law of the realm.⁴⁸ The Stationers Company kept registry of licensed books by entering the titles of works and the members claiming their ownership in registers or books.⁴⁹ Thereupon these licenses were taken by members of the guild, as an absolute right to print a specific 'copy'. Moreover "these 'copy' rights were bought, sold and traded amongst guild members", as by treating them as a kind of property.⁵⁰ It is also in record that members were fined for infringing copy rights by printing other men's copies. Though this protection was only for printers⁵¹ but it became the practice for the members of the stationers company to purchase works of literature from their original producers or authors.⁵² However, the real material rewards for the author was not this onetime fee from licensed publishers but it came from the anticipated royal patronage, as profits from

⁴⁶ Richard Wincor & Irving Mandell, *Copyright, Patents & Trademarks: The Protection of Intellectual and Industrial Property*. (New York: Oceana Publications, Inc, 1980), 3.

⁴⁷ Salathiel C. Masterson, "Copyright: History and Development", *California Law Review*, Vol.28, No.5 (Jul., 1940), 627.

⁴⁸ Ibid.,628.

⁴⁹ Though crown could in principle, extend, revoke or limit license for particular term.

⁵⁰ Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, 32.

⁵¹ or publishers as we call them today.

⁵² Salathiel C. Masterson, "Copyright: History and Development", *California Law Review*,628-629.

the sale of the book were acquired by publisher and not the authors.⁵³ The Stationers Company kept its monopoly through series of Star Chambers decrees. After the fall of Star Chamber, the spirit of the decrees was revived by various ordinances of Parliament passed from 1643 to 1652.⁵⁴ From 1662 a chain of Licensing Acts demanded printed books to be registered with the Stationers Company.⁵⁵

The same monopolistic claims rooted in royal privileges were also found in France in the middle of the 17th century through Paris Book Publishers and Printers Guild. Increasing literary and dramatic rise in reading in Europe in the 18th century caused a flare up of print commerce.⁵⁶ The increase demand of reading material motivated an increasing number of people to become writers. And for the first time writers acquired livelihood from the profit of their writings instead of royal patronage.⁵⁷ Authors started making claim on their work as their property.⁵⁸ This shift of market towards printed material also made a dramatic growth of literary piracy. Cheap reprints began to flood markets.

⁵³ Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, 31.

⁵⁴ These are Ordinance of 1643, Ordinance of 1647, Act of 1649, Act of 1649, Act of 1652.

⁵⁵ Salathiel C. Masterson, "Copyright: History and Development", *California Law Review*, 629, 630.

⁵⁶ It is evaluated that annual Book production in England increased four times in the 18th century.

⁵⁷ For example writers like Daniel Defoe in England, Denis Diderot in France, and Gotthold Lessing in Germany.

⁵⁸ Daniel Defoe wrote in 1700 : "A book is the author's property , 'tis the Child of the inventions, the brat of his brain: if he sells his property, it then becomes the right of the purchaser."

The reform of publishing industry entailed a critical argument about the basis of knowledge and origins and nature of ideas. An inspiring view was that creators vest a natural property right in their ideas. The view was expressed first in England by John Locke⁵⁹ and Edward Young⁶⁰ and later on immediately circulated on the continent.⁶¹ Later on in 1791 a philosopher Johann Gottlieb established a novel theory of copyright based on 'the natural right of property in the unique expressions of ideas' in his essay "Proof of the Illegality of Reprinting: A Rationale and a Parable".⁶²

There are many who opposed Fichte and Diderot and Edward Young concept of intellectual property. Most famous was the French mathematician and philosopher Condorcet. He argued that literary property "is not a property derived from the natural

⁵⁹ in his 'Second Treatise' (1690).

⁶⁰ in his 'Conjectures on Original Composition (1759)' ; for details see Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, 33.

⁶¹ Original Composition was translated into German in the two years after it first emerged , In 1726 Locke's critical passage was argued by French jurist D' Hericourt in court in favor of perpetual rights for authors. Subsequently, in 1763 the same argument was adopted by the encyclopedist Denis Diderot. Later on in 1772, a notable writer, in his essay 'Live and let live' forcefully developed the notion.

⁶² He came to the conclusion after posing difficult question: " if creations of the mind were indeed 'property' what exactly was immaterial property? It seemed to lack the singular physical form unlike other forms of real property". Moreover as large number of people share the same ideas, then many people should be allowed to share the same ideas. Thus he argued that for "idea to be regulated as piece of writing it has to be some distinguishing characteristic that allowed one person, and no other to claim it as his own". Thus he concluded that property do not lie in the ideas themselves but in the unique "form" in which an idea is expressed by the author.

order and defended by social force; it is a property founded in society itself. It is not a true right; it is a privilege." He stated that the author property right could be substituted in a setup where authorized could get remuneration as salaried employees or freelance writers. Moreover according to Condorcet if idea is to be given status of property then it should be on the ground of social utility rather than on natural right. Thus Condorcet gave the concept of "social utilitarianism".

Over the course of the 18th century these principles were detailed in different legal battles in every European country. The first country to take this issue was England.⁶³ The Licensing Act finally expired in 1694. In 1694 by law passed by the Company, during the lapse of Licensing Act in 1681 was immediately revived. However it was found to be dissatisfactory and petitions for statutory relief were presented in 1703, 1706 and 1709.⁶⁴ In response to this, in 1709, the first ever Copyright Act, The Statue of Ann was passed and came into force in 1710.⁶⁵ The Act established revolutionary principles at the time: author was recognized as the principal source of protection and limited term of protection was adopted for published work. The Act gave authors protection of 21 years for already printed books, and 14 years - which could be renewed by author for another 14 years - for unpublished work.⁶⁶

⁶³Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, 37.

⁶⁴ Salathiel C. Masterson, "Copyright: History and Development", *California Law Review*, 630.

⁶⁵ Kevin Garnett, *Copinger and Skone James on Copyright*, 15th edition, (London: Sweet & Maxwell, 2005), 34.

⁶⁶ Ibid., 34,35.

When stationers' monopoly on printing books already in print expired after 21 years the Statue had come into force. A series of cases were bought before the court. The book sellers advocated for the perpetual rights of authors' rights which had been assigned to them. The issue was first decided in favour of "perpetual property rights in the unique expression of an idea" by *Tonson v Collins* in 1760 and *Millar v Taylor* in 1769. The decision was finally reversed by *Donaldson v Becket* in 1774 by the House of Lords. Thus utilitarian doctrine trumped the doctrine of natural right.⁶⁷ In America after the revolution inspired by the Statue of Anne, several of the new states adopted copyright laws. It also becomes the basis for the power given to Congress in the Federal Constitution of 1787: "to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries."⁶⁸ Subsequently it formed the basis of the United States Copyright Statue of May 31, 1790.⁶⁹

Similar set of legal battles were fought in France. At the start of eighteenth century, the French crown declared the privileges as "a grace founded in justice" rather than perpetual property. In 1777 the French Monarch was compelled to review the structure of privileges under the pressure of growing criticism. Primitively authors were granted their class of privileges which were perpetual and inheritable. In 1789 French Revolution

⁶⁷ *ibid*, 35; Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, 37.

⁶⁸ U.S Const Art 1, &8.

⁶⁹ Carla Hesse, "The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance", *Daedalus*, 632.

changed everything; literary privileges were abrogated on grounds of "Freedom of the press". In 1791, a "Law on the Freedom of the Press" was proposed by the Abbe Sieye's, which was written by him with the assistance of Condorcet and others. Sieye's law termed authors creations as a kind of property; at the same time it put limit on exclusive right to ten years after the death of author.⁷⁰ However this proposed law got harsh criticism. It was rejected by veteran book publishers and journalists. However when Jacobins took power and Paris Book Guild stopped acting as a lobbying group, the slightly revised version of Sieye's law was passed by the National Convention in 1793 called "Declaration of the Rights of the Genius."

Germany first adopted a uniform law as late as in 1870. After bilateral treaties, the first international copyright treaty was signed in 1886 by ten European nations after series of conferences.

It was evident by the 19th century that developing nations that were not importers of copyright work like Russia and USA refuse to sign international copyright treaties. They were free to embezzle the ideas and literary creations of the dominant economic power. The USA refrained from becoming member Berne Union for its entire first century and adhered to it on 1989.⁷¹

⁷⁰ The Condorcet's doctrine of public utilitarianism was also reflected.

⁷¹ In the beginning of 19th century USA's publishing houses gained enormous profits from British authors unapproved and unpaid publication. In 1843 'A Christmas Carol' by Charles Dickens was vended for 6 cents in the USA while its original price in England was equal to 2 dollars and 50 cents. American publishers also used the so called "back door to Berne". They secured Berne protection for their work by concurrent publication of work in USA and a country member Berne Union. America justified their

1.2.1 Evolution of Copying and Copyright in Arab and Muslim world

Before the advent of Islam copying was the only tool to spread knowledge. Scholars used to hand write by pens on different kinds (of paper) made up of skin and wood. After remaining a free source of spreading knowledge, copying became known and profitable occupation. Generations of scholars became known for copying and it became a source of income for them.

Scholars, especially *muhadatheen*⁷² used to give a lot of importance to copying and its credibility; to avoid errors while copying. In a book called '*al misbah al madi*' by Ibne Hadida names of copyists of Holy Prophet (peace and blessings of Allah be upon him) are mentioned. Among them Najia Itafawee and Nafay bin Zuraib were famous *Sahaabah* (may Allah be pleased with them).

There are several evidences of taking profit for copying scripture. Jafar bin Sulaiman states: scripture was written in four months and its profit was used in buying eatables. Also Imam Ahmad bin Hambal in 231 Hijri got two pieces of clothes from his writing.⁷³ Also Yahya Al Arzani in 415 Hijri used to write daily for a person for half a dirham and

practices on utilitarianism. That it was public interest of America to have work in the cheapest prices. America signed Berne Convention only when they found themselves in suitable position to sign the Convention.

⁷² Scholars of *hadeeth*.

⁷³ When his clothes were stolen.

this was his bread and butter.⁷⁴ Ibne Khadaba copied Sahih Muslim seven times for profit or wages. Also Abiya Anarse Al Hafiz Al Masnad in 519 Hijri used to copy for profit to support his family.⁷⁵ Also in Al Wardee Al Mohandis, Muhammad bin Hassan Al Basree in 525 Hijri used to copy for profit. Also in Al Montazim Abdul Malik bin Abdullah Al Karkhee in 548 Hijri used to copy from Jamia Tarimzee to earn his living. Also in Asayer by Zahabee: Ahmad bin Adanee in 609 Hijri used to copy 'Atayser' weekly to earn his living. Also Ibne al Majid al Hafiz Ahmad bin al Muhadis Esa bin al Imam al Mofiq Ibne Qudama in 643 Hijri wrote for wages and his students benefited from it. There were thousand copies of Sahih Bukhari in the treasure of Qashash al Maghribi in 1031 Hijri.⁷⁶

Copying by hand continued until the advent of printing. Later on it ceased or became limited to writers. Now work is send to printer, and hundreds and thousands of copies are printed and spread in short interval. Also with the advent of printing modern concept of copyright emerged.⁷⁷

The first book in Arabic language was printed in 1514 AD at Italy. The name of book was 'Salat Al-sawai' and contained 211 pages. In 1530 Holy Quran was published in

⁷⁴ *Maujim al adaba* 9/30-31, quoted in Dr. Bakr bin Abdullah Abu Zaid "Malkiata ataleef tareekhan wa hukman", *Majala al-Majma al-Fiqhi al-Islami*, year 2, 3rd edition, (Saudi Arabia: Dar al-Basheer lii nashr wa tozee, 1986), 201- 203.

⁷⁵ Al sayar lilzahabee 19/ 111 quoted by Dr. Bakr bin Abdullah Abu Zaid, "Malkiata ataleef tareekhan wa hukman", *Majala al-Majma al-Fiqhi al-Islami*, 203.

⁷⁶ Ibid., 202-204.

⁷⁷ Ibid., 205.

Arabic language but its printing was stopped in fear of getting it corrupted by the beliefs of Christians.

1.2.2 Evolution of Copyright Laws in Pakistan

The concept of intellectual property and copyright was absolutely novel for an agrarian society of the subcontinent prior to the colonization. In 1842, when the Literary Copyright Act was passed in the United Kingdom, it also extended throughout the British Dominions including British India as well. Thus, An Act for the encouragement of learning was passed by the Governor General of India on 1847, in the domain governed by the East India Company.

Some modifications were considered to be desirable due to difference between English and Indian administration and procedure. Therefore Bill eventually became law and came to be known as Indian Copyright Act, 1914.⁷⁸ After independence the Copyright Act, 1914 remained in force till 1962 when the Copyright Ordinance 1962 was promulgated.⁷⁹ Later on amendments are made in the Ordinance by the Copyright

⁷⁸ According to Professor Upendra, cited in: Dr.Faizan Mustafa, *Copyright Law: A Comparative study*, 1st ed. (New Delhi: Institute of Objective Studies, 1997), 75.

⁷⁹ India revised their law much earlier that is in 1957 by Copyright Act 1957. In *Sibtain Fazli v Star Film Distributors* (PLD 1964 SC.337, 16 DLR) 198, it was held that the copyright originated in India (after independence) would not be protected in Pakistan and vice versa.

(Amendment) Act, 1992 ("the Amendment Act")⁸⁰ and then by Copyright (Amendment) Ordinance in 2000.

⁸⁰Khursheed Khan & Associates, "Copyright Protection in Pakistan", Sitesurfer Publishing LLC, <http://www.pakistanlaw.com/copysoft.htm> (accessed December 20, 2009).

CHAPTER 2

COPYRIGHT IN ITS CONTEXT

2.1 Nature of Copyright

Copyright is a property right. It falls into a kind of personal property which is called 'Chose'⁸¹ in Action'. Chose in Action is a form of property which are not tangible physical objects⁸² or incorporeal.

Copyright confides "artistic creations, such as books, music, paintings and sculptures, films and technology based works such as computer programs and electronic databases".⁸³ For material to be copyrighted it should be an original work of authorship. The nature of its originality requires the work to be creative, not copied from another source.⁸⁴ However the existence of sufficient originality is a "question of fact and

⁸¹ Chose means things.

⁸² Choses in possession, is tangible movables. It is a property which can actually be possessed and transferred by physical delivery.

M.A Philip S. James. *Introduction to English Law*, 10th ed, (London: Butterworths, 1979), 481.

⁸³ WIPO, *Understanding Copyright and Related Rights*, (Switzerland: WIPO Publications, n.d), 6,

http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf, (accessed 5 May, 2009).

⁸⁴ It need not be novel, as in patent requirement, but should be independent.

degree".⁸⁵ Originality has nothing to do with the literary and artistic merit of the work. Copyright is given to first producer irrespective of the fact that work be wise or foolish, accurate or inaccurate. All compilations including a diary are capable of having a copyright⁸⁶ if work, labor and skill required are not negligible.⁸⁷

Creative work must be fixed in tangible medium of expression in order to be copyrighted.⁸⁸ Copyright is a right of limited time period. Unlike physical property, that is perpetual and inheritable, copyright exists only for a certain time period after the death of creator. After the expiration of time fixed by statute, works drops into the 'public domain'.⁸⁹ Copyright is an exclusive rights as owner of copyright can prohibit all other from copying the work.⁹⁰

Copyright consists of two kinds of rights -economic and moral. Economic right is the right of creator to acquire financial reward from his work.⁹¹ Moral right is the right of

⁸⁵ Abbas Hussain Farooqui v Merr Royal Printing Press and Ali Printing Se... Karachi and 10 others, PLD 1970 Karachi 554.

⁸⁶ Ibid., 567.

⁸⁷ Ibid., 561.

⁸⁸ Gerald R. Ferrera, Stephen D. Lichtenstein, and others, *Cyber law: Texts & Cases* (USA: South Western College Publishing, 2001), 68.

⁸⁹ It becomes public property and can be used by anyone. Stephen M. Stewart, *International Copyright and Neighbouring Rights*, 4

⁹⁰ Ibid.

⁹¹ WIPO, *Understanding Copyright & Related Rights*, (Switzerland: WIPO Publications, n.d), 8, http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf, (accessed 5 May, 2009).

attribution of author towards his work. It also contains right of integrity of the work, which is authors right to take certain actions against multination or distortion of his work or anything else that harms his reputation.⁹² Moral right remains with author even after transferring economic rights, as moral rights are "perpetual, inalienable and imprescriptible".⁹³ Berne Convention provides for moral rights to be included in the copyright laws of Berne Convention countries.⁹⁴ Moral rights are conferred to authors by Section 62 of Copyright Ordinance, 1962.

Copyright is a branch of 'intellectual property' as it is creation of mind before being formulated into material form.⁹⁵ Though being an element of intellectual property copyright is quite different from its other branch (namely industrial property).⁹⁶ The most basic difference between two is that protection of inventions does not require it be

⁹² Intellectual Property Office, *Moral Rights*, <http://www.ipo.gov.uk/types/copy/c-otherprotect/c-moralrights.htm> (accessed 6 June 2011)

⁹³ Its importance was contained in French law; Dr. Faizan Mustafa, *Copyright law: A Comparative Study* (New Delhi: Institute of Objective Studies); see also Stephen M. Stewart, *International Copyright and Neighbouring Rights*, 58.

⁹⁴ Micheal F. Flint, *A User's Guide to Copyright*, 2nd edition (London: Butterworths, 1985), 71.

⁹⁵ Stephen M. Stewart, *International Copyright and Neighbouring Rights*, 4.

⁹⁶ "Industrial Property includes patents to protect inventions, and industrial designs. It also covers trademarks, service marks, layout-designs of integrated circuits, commercial names and designations as well as geographic indications, and protection against unfair competition."

WIPO, *Understanding Copyright and Related Rights*, (Switzerland: WIPO Publications, n.d), 6, http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf, (accessed 5 May, 2009).

presented in a physical form; it is the protection of ideas. However, copyright law covers only the embodiment of expression of ideas but not the ideas themselves. Apart from this main difference, it is also distinct in the legal protection granted to each of them. Protection of inventions is short in duration as compared to copyright.⁹⁷ For protection of invention, it must be displayed publicly in an official register however this is not required for copyright protection as it gets protected as soon as it comes into existence.⁹⁸ Boundaries of copyright are also confused with those of trade marks. The purpose of copyright as well as patent is to stimulate to "promote the progress of science and useful arts" while the purpose of trademark is to prevent confusion in the commercial market place.⁹⁹

2.2 Ownership and Transfer of Copyright

2.2.1 Ownership of Copyright

The general rule is that the author of a work is the initial copyright owner¹⁰⁰ unless otherwise provided. As Berne Convention states "for the protection of rights in authors in their...works"¹⁰¹ as well as certain national laws, like in Pakistan Section 13 of the

⁹⁷ It is because protection for invention gives a monopoly right to exploit an idea; for example in Pakistan protection for patent is twenty years from the filing date under Section 31 of the Patents Ordinance, 2000 whereas for copyright it is fifty years according to Copyright Ordinance, 1962.

⁹⁸ WIPO, *Understanding Copyright & Related Rights*, 7.

⁹⁹ Robert A. Gorman, *Copyright law* (Washington D.C: Federal Judicial Center, 1991), 4.

¹⁰⁰ Gravin McFarlane, *A Practical Introduction to Copyright*, 2nd ed, (London: Waterflow Publishers, 1989), 11

¹⁰¹ Article 1, Berne Convention

Copyright Ordinance 1962¹⁰² clearly support this proposition. However special rule apply in two situations: Commissioned works and works created in employment. Section 13 states that for employment and government work, employer and government shall be the first owner, unless otherwise provided.

2.2.2 Transfer of Copyright

Copyright can also be transferred like other forms of property-inter vivo or upon death from the initial author- again by the new owner. Transfer can take place completely or partially.¹⁰³ Transfer takes in the shape of assignments and licenses. In return author gets compensation referred to as royalties. Royalty consists of periodic payments determined upon a percentage (the royalty rate) of the sale of copies or performance of the work, but it can also be paid in one lump sum.¹⁰⁴

Assignment is transfer of the ownership of a copyright. It can be the transfer of the ownership of the whole right or part of it¹⁰⁵, or subject to limitations. When copyright is assigned, the assignee- as respects the right so assigned -becomes the owner of copyright

¹⁰² Hereinafter referred as Copyright Ordinance.

¹⁰³ Robert A. Gorman, *Copyright law* (Washington: Federal Judicial Center, 1991), 52.

¹⁰⁴ Robert B. Chickering & Susan Hartman, *How to register a copyright and protect your work* (New York: Charles Scriber's Sons, 1980), 180.

¹⁰⁵ Examples of partial transfer are an assignment of the copyright for a term of seven years (time limitation) and an assignment limited to Punjab (geographical limitation). Moreover, the individual exclusive rights (reproduction, modification, translation, etc) can also be transferred; J. Dianne Brinson and Mark F. Radcliffe, *Internet law & business handbook*, 1st ed, (USA: Publisher's Cataloging in Publication, 2000), 33.

in the protected work. An assignment is not valid unless it is in writing and is signed by the assignor¹⁰⁶ or his authorized agent.¹⁰⁷

In Pakistan Section 14 (1) of the Copyright Ordinance has laid down some conditions for assignment. These are:

(1) The assignment of copyright shall take effect only when the work comes into existence.

(2) Where the owner of the copyright in a work is the author of the work, then no assignment for more than ten years will be effective.

However this condition will not be applicable where the assignment is made in favor of Government or an educational, charitable, religious or non-profit institution. Sub clause (2A) of the same section further states that if copyright owner or publisher/assignee considers any terms of the assignment adverse to his interests then he may within one year of such assignment apply to the Board to consider such term. The Board after hearing both the parties may pass an order and that order will be binding on both the parties.

"License is a copyright owner's grant of permission to use a copyrighted work in a way that would otherwise be copyright infringement."¹⁰⁸ A license is generally less than an assignment. When licensing, the copyright owner retains ownership or title but only

¹⁰⁶ The owner of the rights conveyed.

¹⁰⁷ Section 15, The Copyright Ordinance, 1962.

¹⁰⁸ J. Dianne Brinson and Mark F. Radcliffe, *Internet law & business handbook*, 1st ed, (USA: Publisher's Cataloging in Publication, 2000), 35.

limited economic rights are granted to the licensees, mostly for a particular time period and for some particular use of the property. For example, an author of a book might grant separate licenses to publisher to make and distribute copies of the book and simultaneously he may also grant licenses for the serialization rights¹⁰⁹ and the translation rights.¹¹⁰

A license can be exclusive or non-exclusive. Under exclusive license, owner of copyright do not allow third party to perform the same licensed act whereas he may authorize the same under non-exclusive right. For example the recording right, where more than one record companies are being licensed, in turn to record the same work.¹¹¹

In Pakistan Section 35 of the Copyright Ordinance deals with license which states that license must be in writing and signed by the owner of the rights conveyed. It also states that license in any future work can take effect only when the work comes into existence. The owner of copyright may also relinquish the exercise of the rights, wholly or partially. Section 17 of the Copyright Ordinance states procedure to abandon copyright. Copyright owner has to give notice to the Registrar, who shall cause it to be published in the official Gazette.

¹⁰⁹ to newspapers and magazines.

¹¹⁰ In translation rights, separate license will be granted for translation in separate language; Stephen M. Stewart, *International Copyright and Neighbouring Rights* , 66.

¹¹¹ ibid; J. Dianne Brinson and Mark F. Radcliffe, *Internet law & business handbook*, 35; WIPO, *Understanding copyright and related rights*, 16.

2.3 Rights in Copyright

2.3.1 The Exclusive Rights in Copyright

A Copyright owner has following exclusive rights in the copyrighted work:

- To reproduce the copyrighted work in various forms
- To sell, rent, lease or otherwise distribute copies of the copyrighted work
- To prepare derivative works based on the copyrighted work such as translation and adaptation
- To perform and display publicly the copyright work.¹¹²

(a) Reproduction right

The right to reproduce is the right of the copyright owner to prevent others from making copies or phone records of his work through any method of reproduction applicable to the particular work. Reproduction of a work can be constituted by printing, mimeographing, taping, and even copying in handwriting.¹¹³ This is the most basic right protected by copyright legislation and is the basis for many forms of exploitation of protected work.¹¹⁴

(b) Distribution right

¹¹² Gerald R. Ferrera, Stephen D. Lichtenstein, and others, *Cyber law: Texts & Cases*, 69.

¹¹³ Robert B. Chickering & Susan Hartman, *How to register a copyright and protect your work*, (New York: Charles Scriber's Sons, 1980), 150.

¹¹⁴ WIPO, *Understanding Copyright & Related Rights*, 10v.

The distribution right is the right of the author to control the distribution of copies or phone records of the work to the public by sale, rental or lease.¹¹⁵ Some copyright laws also include a right to control the importation of copies. The right of distribution is recognized in order to ensure that basic right of reproduction is respected. Obviously, the right of reproduction would be of little economic value if copyright owner could not authorize the distribution of the copies made with his consent.¹¹⁶

The right of distribution terminates upon first sale or transfer of ownership of a particular copy. Therefore a particular copy can be redistributed after first distribution without the author's consent. As for example, when the copyright owner of a novel sells or transfers its ownership to a bookstore or library, the bookstore or library is free to sell, lend, or giveaway those copies to whomever they wish, without the necessity of seeking authorization to further distribute the work from the copyright owner. In other words, after distribution of a particular copy, copyright owner relinquish his right to control distribution of subsequent copies.¹¹⁷

(c) Derivative work right¹¹⁸

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 115 Gerald R. Ferrera, Stephen D. Lichtenstein, and others, *Cyber law: Texts & Cases*, 71; Robert B. Chickering & Susan Hartman, *How to register a copyright and protect your work*, 151.

116 WIPO, *Understanding Copyright & Related Rights*, 10

117 Robert B. Chickering & Susan Hartman, *How to register a copyright and protect your work*, 151. ; WIPO, *Understanding Copyright & Related Rights*, 10.

118 Derivative work right is also known as modification right i.e. the right to modify the work to create a new work.

"A new work that is based on pre existing work is known as derivative work."¹¹⁹ A derivative work includes "a translation, musical arrangement, dramatization, fictionalization, motion picture versions, sound recording, art reproduction, abridgment, condensation or any other form in which a work may be recast, transformed or adopted."¹²⁰ Some of the derivative works are themselves copyright protected, for example translations and adaptations. Therefore if anyone wants to publish them then he must get authorization from copyright owner of the original work as well as copyright owners of adaption and translation or adaptation.¹²¹

(d) Public performance and public display right

"The public performance right is the right to: recite, play, dance, act, or show the work at public or to transmit it to the public."¹²² Owner of copyright has the exclusive right to prohibit others from giving public performance of his work .However no consent of copyright owner is required to perform the work in private. Public performance also constitutes a semipublic place, or a place not open to the public, but where a considerable amount of people, other than of usual family circle and its social network are assembled.¹²³

¹¹⁹ J. Dianne Brinson and Mark F. Radcliffe, *Internet law & business handbook*, 6.

¹²⁰ Gerald R. Ferrera, Stephen D. Lichtenstein, and others, *Cyber law: Texts & Cases*, 73.

¹²¹ WIPO, *Understanding Copyright & Related Rights*, 12.

¹²² J. Dianne Brinson and Mark F. Radcliffe, *Internet law & business handbook*, 6.

¹²³ Gerald R. Ferrera, Stephen D. Lichtenstein, and others, *Cyber law: Texts & Cases*, 73 ; *Understanding Copyright & Related Rights*, 11.

"The public display right is the right to show a copy of the work directly or by means of a film, slide, or television image at a public place or to transmit it to the public."¹²⁴ Likewise, it also includes the right to control the first and subsequent displays of a given copy of the work.¹²⁵

2.3.2 Limitation on Rights

Exclusive rights given by the copyright law are in no sense absolute. There are some limitations and reservations regardless of the author's personal contribution, or economic investment of the author. These are free dealing or free use, the first sale doctrine, public domain use, non-voluntary licenses and exclusion of certain categories of works.

The limitations on copyright are one of the most important characteristic of copyright as they are necessary to maintain balance between two interests; the public interest in rewarding creators of works and the public interest in the widest dissemination of works which is also the interest of users of such work.¹²⁶ Thus proper formulation of this doctrine executes a critical role in the justification of copyright law.¹²⁷

(a) Compulsory license

"Non voluntary license allow use of works in certain circumstances without the authorization of the owner of rights, but require that compensation be paid in respect of

¹²⁴ J. Dianne Brinson and Mark F. Radcliffe, *Internet law & business handbook*, 6.

¹²⁵ Robert B. Chickering & Susan Hartman *How to register a copyright and protect your work*, 152.

¹²⁶ Stephen M. Stewart, *International Copyright and Neighbouring Rights*, 66.

¹²⁷ For those who justify copyright law on the doctrine of *maslaha* or utilitarianism.

the use".¹²⁸ Thus unlike consensual licenses, under compulsory license the copyright owner are compelled to grant a license.¹²⁹ Therefore the absolute right of the copyright owner is limited to a right of equitable compensation. This right of equitable remuneration or compensation distinguishes compulsory licenses from free use of the work.¹³⁰

On the international level Berne Convention contain two provisions relating to compulsory license. Article 11 bis (2) relate to broadcasting rights and article 13(1) relates to recording right. In both cases it has to fulfill three conditions: 1) The moral rights must be safe guarded (2) Compensation must be provided: and its amount is to be filled by 'competent authority', unless otherwise provided.¹³¹ (3) The non-voluntary license must only be applicable in the country which has provided for it in its legislation and nowhere else.

Certain categories of works are also excluded from copyright protection. In some countries, works that are not fixed in tangible form are excluded from protection. For example, a work of choreography would only be protected once it is fixed in tangible form by writing it down in dance notation or recording a videotape.¹³² In certain

¹²⁸WIPO, *Understanding Copyright and related rights*, 14.

¹²⁹ Robert B.Chickering & Susan Hartman, *How to register a copyright and protect your work*, 180.

¹³⁰ Free use carries no obligation to compensate the right owner for the use of the work without authorization; Stephen M. Stewart, *International Copyright and Neighbouring Rights*, 73; WIPO, *Understanding Copyright and related rights*, 13.

¹³¹ Competent authority means a government agency or a special tribunal.

¹³² WIPO, *Understanding Copyright and related rights*, 13.

countries, like Pakistan, judicial and administrative decisions are excluded from copyright protection.

(b) Public Domain

Copyright appears the moment the work has been created, or, under some national laws, when it has been fixed in a tangible form. It is continuous, generally, until it expires after certain time the death of the creator.¹³³ Thus after the expiry of a specified term, work falls into public domain and can be used by anyone. No one can claim the exclusive rights of copyright for such works into public domain.

The duration of copyright vary from country to country. As a general rule in Berne Convention, the duration of copyright is life of the author plus fifty years after his death. Duration of protection for works such as anonymous, posthumous and cinematographic work is also provided in Berne Convention.¹³⁴ Numbers of countries have lengthened the duration of copyright. In EU and USA, the term of copyright is seventy years after the death of creator or author.¹³⁵ In Pakistan under section 18 of the Copyright Ordinance it is the life of the author until after fifty years after his death. Whereas for anonymous,

¹³³ Ibid.

¹³⁴ Article 7, Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979

¹³⁵ J. Dianne Brinson and Mark F. Radcliffe, *Internet law & business handbook*, 8,153; SOAS, "Copyright Guidance for SOAS Library Users: Summary of the Duration of Copyright for Major Categories of UK-created Works", <http://www.soas.ac.uk/infocomp/copyright/library/duration/file40813.pdf> (accessed January 12, 2010).

posthumous and cinematographic work copyright subsist until fifty year from when it is published.¹³⁶

2.4 Infringement of Rights

2.4.1 Infringement

Section 29 of the Copyright Ordinance deals with infringement in published editions of work and Section 56 of the Copyright Ordinance defines copyright infringement.

Copyright work will be infringed:

- a) When any person, without the consent of copyright owner or without license or in contravention of the conditions of a license so granted or any other conditions imposed by a competent authority who is authorized by the copyright ordinance
 - i. Does anything which was the exclusive right of copyright owner
 - ii. Permit for profit any place to be used for public performance where such performance constitutes an infringement of the copyright. However if he was not aware or had no reasonable grounds to suspect an infringement of copyright in performance then work will not be an infringement.
- b) Also when any person make for sale or hire, lets for hire, or display or offer for sale or hire by way of trade, or distributes, exhibit in public or import from Pakistan any infringing copies.

¹³⁶ Section 19, 20 and 21 of the Copyright Ordinance 1962.

If pirated work contains more material than the infringed work then infringement will be deemed to be done to the extent of work infringed. As, for example, when infringing mathematics book contained sums and solutions whereas infringed book contained only sums, it was held infringement of copyright extends only to the sums copied and not to solutions.¹³⁷

2.4.2 Remedies for Infringement

Remedies for infringement of copyright are of three kinds: civil, administrative and criminal.¹³⁸

(a) Civil remedies

The civil remedies are further of two kinds: preventive and compensatory.¹³⁹

Preventive remedies: The preventive remedies are:

The power of search and seizure: The owner of copyright may take proceedings for recovery of infringing copies and plates used or intended to be used for the production of such infringing copies.¹⁴⁰

Anticipatory Injunctions or Interim Orders: The court may pass an interim order without prior notice to the defendant, if it is satisfied that the "applicant has some interest in copyright[,] or the work and the right of applicant is likely to be infringed, affected or prejudiced and any delay in passing such orders is likely to cause

¹³⁷ PLD 1968 Dacca 455, East Pakistan School Text-Book Board v Debabrata Chaki and other.

¹³⁸ Stephen M. Stewart, *International Copyright and Neighbouring Rights*, 79.

¹³⁹ Ibid.

¹⁴⁰ Section 63, The Copyright Ordinance, 1962.

irreparable harm to the applicant" Court may also pass an interim order " where there is reasonable risk of evidence, either being destroyed, hidden or removed from the jurisdiction of the court or otherwise there is likelihood of frustration of the intended proceedings if immediate action could not be instituted or there is likelihood of multiplicity of proceedings in the absence of such orders."

Compensatory: Anyone whose copyright has been violated is able to sue for: damages, injunction, and accounts of profits gained by the defendant as result of infringement, or any other remedy granted by the law.

In case where the infringer did not know that the subject matter which had been infringed was in copyright and had acceptable grounds for assuming that copyright did not exist in the work than exemplary damages cannot be awarded. In such a case remedy will be only by way of injunction or decree for the whole or part of the profits made by the defendant as a result of infringement.¹⁴¹

(b) Administrative measures

Administrative measures are adopted so that the importation and exportation of infringing copies can be taken or stopped by the custom authorities. In Pakistan the Registrar on the application of the copyright owner or his agent and after inquiry may give an order to halt the import and export of infringing copies.¹⁴²

¹⁴¹ Section 60, The Copyright Ordinance, 1962.

¹⁴² Section 58, 65 A, 65 B, 65 C of The Copyright Ordinance, 1962.

Court while passing an interim order may also direct custom authorities to refuse release of consignment containing infringing copies of the work.¹⁴³

(c) Criminal remedies

Punishment for infringement of copyright work or its abetment in Pakistan "may extend to three years, or with fine which may extend to one hundred thousand rupees, or with both". That is the penalty for publishing collection or compendiums of work which have been adapted or modified in any manner without the authority of the owner of the copyright, unauthorized reproduction or distribution of counterfeit copies of sound recording and cinematographic work, exploitation and appropriation of recording or audio visual work intended for private use, making copies or reproduction in excess of those authorized by the copyright owner or his successor in title, unauthorized rental of cinematographic works and computer programmes.¹⁴⁴ Penalty for possessing plates for purpose of making infringing copies, making false entries in the Register or producing or tendering false evidence, making false statements for the purpose of deceiving or influencing any authority or officer and for false attribution of authorship is imprisonment which may extend to two years or with fine which may extend to one hundred thousand rupees, or with both.¹⁴⁵

¹⁴³ Section 60 A (4), The Copyright Ordinance, 1962.

¹⁴⁴ Section 66, 66 A, 66 B, 66 C, 66 D and 66 E of The Copyright Ordinance, 1962.

¹⁴⁵ Section 67, 68, 69 and 70 of The Copyright Ordinance, 1962.

Imprisonment which may extend to three years or with fine which may extend to one hundred thousand rupees, or with both is for any person who publishes a record or video film without particulars such: as the name and address of the copyright owner or the person who made the record or video film, and the declaration of the person who made the film that he has obtained necessary license or consent from copyright owner, if work is a cinematographic film required to be certified for exhibition under the provisions of Motion Picture Ordinance 1979 then copy of the certificate granted in respect of such work by the Central Board of Film Censors, and the year of first publication of record.¹⁴⁶ If a person is again convicted for the same offence then there is enhanced fine.¹⁴⁷

2.5 International Treaties, Conventions and Agreements

The two major copyright conventions are the Berne Convention (1886) and the Universal Copyright Convention (1952). Other important conventions and copyright relations are the Rome Convention (1961), the Phonogram Convention (1971) and the TRIPS Agreement (1994). The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (1996) are supplements of Berne and Rome Conventions.¹⁴⁸ Though copyright is defined in each country's national legislation but basic concept of copyright

¹⁴⁶ Section 57-A and 70 A of The Copyright Ordinance, 1962

¹⁴⁷ Section 70 B of The Copyright Ordinance, 1962

¹⁴⁸ Kevin Garnett, *Copinger and Skone James on Copyright*, 13th ed, 1159.

is same in almost all laws because of these international conventions.¹⁴⁹ International Copyright conventions, treaties and agreements to which Pakistan is signatory are discussed below:

2.5.1 Berne Convention

At the initiative of Swiss Government conferences were held in 1884 and 1885 in an attempt to draw up an international copyright treaty. This resulted in the framing of 'Berne Convention' at the Diplomatic Conference held at Berne in 1886.¹⁵⁰ It came into force on December 5, 1887. Initially the treaty was signed by ten countries: Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Liberia, Switzerland and Tunisia¹⁵¹ and now in 2011 there are 164 contracting parties of Berne Convention.¹⁵² Pakistan is member of Berne Convention since July 1948.¹⁵³

¹⁴⁹ WIPO, *Guide on surveying the economic contribution of the copyright based industries*, (Geneva: World Intellectual Property Organization, 2003), 13

http://www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf

¹⁵⁰ Kevin Garnett, *Copinger and Skone James on Copyright*, 13th ed, 1160.

¹⁵¹ Paul Goldstein, *International Copyright: Principles, Law and Practice* (USA: Oxford University Press, 2001), 19- 20.

¹⁵² WIPO, "Treaties Statistics", [http://www.wipo.int/treaties/en/statistics/StatsResults.jsp? treaty_id=15\(&en.](http://www.wipo.int/treaties/en/statistics/StatsResults.jsp? treaty_id=15(&en.) (accessed March 19, 2011).

¹⁵³ WIPO, "Contracting Parties",

http://www.wipo.int/treaties/en>ShowResults.jsp?search_what=C&country_id=140C (accessed March 19, 2011).

The treaty created a Union which was structured to exist separate and apart from any particular act of the treaty. This means that treaty could be revised from time to time to meet changing conditions, yet it was not binding on the Union members to adhere to the new act. Also any country could become part of the Union by adhering to the latest act of the Convention. Relationship between Union members would be governed by the terms of the particular act or acts to which they adhered.¹⁵⁴ The Convention has been revived periodically. Since 1886 it has two Additions and five Revisions.¹⁵⁵

- 4 May 1896: Additional Act of Paris (entry into force on 9 December, 1897)
- 13 November 1908: Berlin Act (entry into force on 9 September, 1910)
- 20 March 1914: Additional Protocol of Berne (entry into force on 20 April 1915)
- 2 June 1928: Rome Act/ Revision (entry into force on 1 August 1931)
- 26 June 1948: Brussels Act/ Revision (entry into force on 1 August 1931)
- 14 July 1967: Stockholm Act / Revision (substantive provisions themselves revised in 1971, administrative provisions entered into force in 1970)
- 24 July 1971: Paris Act/ Revision (entry into force on 10 October 1974)

The protection of 1886 Berne Text is given to 'authors' and their 'works'. The predominant influence of publishers was recognized. The country of the origin of the

¹⁵⁴ Paul Goldstein, *International Copyright: Principles, Law and Practice*, 20-21.

¹⁵⁵ Stephen M. Stewart, *International Copyright and Neighbouring Rights*, 89.

work was the country in which work was first published. Whereas for unpublished works the country of origin was that of which the author was national.¹⁵⁶

Berlin Act in 1908 introduced several important changes. The Berlin Act prohibited formalities as a condition to the acquisition, exercise or enjoyment of copyright. It added protection for cinematographic productions or derivative works.¹⁵⁷ It also added a qualified right to make recordings of musical works. The Berne Act also established a minimum term of protection as fifty years after the author's death, subject to the rule of comparison of terms.¹⁵⁸

The 1928 Rome Act also made important additions. Rome Act added moral rights of attribution and integrity as Convention's minimum rights.¹⁵⁹ Right to broadcast copyrighted works was another addition; however they were subjected to a compulsory license under national legislation.¹⁶⁰ It was also provided that the minimum copyright term for joint works was to be measured from the death of the last surviving author.¹⁶¹

¹⁵⁶ ibid 90; Paul Goldstein, *International Copyright: Principles, Law and Practice*, 21.

¹⁵⁷ Berne Convention 1908 Berlin Text, Art 4(2).

¹⁵⁸ Berne Convention 1908 Berlin Text, Art 13 ; Paul Goldstein, *International Copyright: Principles, Law and Practice*, 21.

Rule of comparison of terms is also called rule of the shorter term.

¹⁵⁹ Berne Convention, 1928 Rome Text Art 6 bis.

¹⁶⁰ Berne Convention, 1928 Rome Text Art 11 bis.

¹⁶¹ Berne Convention, 1928 Rome Text Art 7 bis (I), Paul Goldstein, *International Copyright: Principles, Law and Practice*, 22.

The Brussels Act in 1948 clarified or strengthened several minimum rights including moral rights, the adaptation rights, and the translation right. It also clarified rights in cinematographic works. Act also explained the broadcast right to include television.¹⁶² The Paris Act of 1971 also made several additions. It prescribed that work will be entitled to protection in Union country even when it is not of country of origin if author is national or domiciliary of a member state or if the work is first or simultaneously published in a member state.

The Act gives members states some flexibility in determining conditions for protection. For example according to Article 2 (7) it is a matter for the countries in the Union to prescribe that the work in general or specified shall not be protected unless they have been fixed in some material form. The Paris Act also establishes rules for non-protectionality¹⁶³ and also permits members states to carve out exceptions from liability and compulsory licenses in certain cases¹⁶⁴.

The 1971 Act also entitles Union members “to enter into special agreements among themselves” if such agreements grant more extensive rights to authors than those granted by the Convention or contain other provisions not contrary to the Convention.¹⁶⁵

¹⁶² Paul Goldstein, *International Copyright: Principles, Law and Practice*, 22.

¹⁶³ Protection shall not apply to ‘news of the day or to miscellaneous facts having the character of mere items of press information’; Berne Convention, 1971 Paris Act, Art 2 (8).

¹⁶⁴ Berne Convention 1971 Paris Act, Article 9 (2) and 10 (1).

¹⁶⁵ Berne Convention 1971 Paris Act, Article 20.

2.5.2 TRIPS Agreement

The Great Conventions of intellectual property rights have always been amended from time to time to strengthen the protection of IPR. However since the mid 1960's this process of development has been broken down, because of the conflict of interest between the developed/industrialized and the developing countries. It has been stated that on account of failure to revise and modernize the Great Conventions led industrialized countries to press for a change of venue from the WIPO¹⁶⁶ and UNESCO¹⁶⁷ to a forum where developing countries as a group could exert less effective power.

Unsuccessful initiative to obtain an "Agreement on Measures to Discourage the Importation of Counterfeit Goods" began from EC and USA in 1979 in the closing days of GATT. Two years later in 1982, the United States proposed a work program to examine issues unresolved by the Tokyo Round. Draft commercial counterfeiting code was submitted to the GATT by United States, the European Community and Canada. Brazil and India immediately challenged the proposal. They argued that WIPO had exclusive jurisdiction over commercial counterfeiting, however work program advanced. In 1986 a group of developed nations presented an informal declaration of negotiating

¹⁶⁶ World Intellectual Property Organization, which administers the Paris and Berne Convention.

¹⁶⁷ United Nations Organization for Education, Science and Culture, which administers the Universal Copyright Convention.

mandates, intellectual property was also included in it. Several developing nations opposed the GATT's authority to deal with intellectual property at all.¹⁶⁸

On September, 1986, a Special Session of the Contracting Parties to the GATT identified the negotiating objective for intellectual property. A midterm review of the Uruguay Round in December 1988 reported agreement on eleven of the fifteen subjects being negotiated, but not on TRIPS. However at a subsequent midterm meeting in April 1989, the Trade Negotiations Committee agreed on a framework for TRIPS. After negotiations and despite of pulls and pressure, the 1992 text became the basis for the TRIPS agreement adopted at Marrakesh in April 1994.¹⁶⁹

¹⁶⁸ Developing countries preference to WIPO as a forum more favorable to their interests was based on the following:

- Avoiding threat of sanctions as a potential consequence of failure to protect IPRs;
- WIPO has a history of helping developing countries in preparing laws, training IPRs office personnel and in assisting in the creation of the patent protection system infrastructure;
- The treaty negotiation system of WIPO lacks the intensity of pressure for reaching the strict consensus that is present in the WTO; political balance of power in WIPO is more favourable to them than the balance in the WTO.

M.B. Rao & Manjula Guru, *Understanding TRIPS : managing knowledge in developing countries* (New Dehli: Response Books, 2003), 22, 27 ; Paul Goldstein, *International Copyright: Principles, Law and Practice*, 53-54.

¹⁶⁹ Paul Goldstein, *International Copyright: Principles, Law and Practice*, 54; M.B. Rao & Manjula Guru, *Understanding TRIPS : managing knowledge in developing countries*, 29.

The TRIPS Agreement finally emerged after years of wrangling. The agreement is built on the earlier international agreements/conventions¹⁷⁰ while at the same time it makes the application of preexisting agreements more effective and adds new obligations with respect to matters where the pre-existing conventions are silent or were being felt as inadequate. The TRIPS agreement is therefore sometimes referred to as Berne Plus and Paris Plus agreement.

The TRIPS agreement recognizes that rules and disciplines were needed to deal with widely varying standards in the protection and enforcement of intellectual property rights, as varying rules have been a growing source of tension in international economic relations. Major part of the provisions in Part I and Part II of the TRIPS Agreement clarify existing provisions in the earlier agreements/conventions. Part I sets out general provisions and basic principles. It contains a national treatment commitment¹⁷¹ and most favored-nation clause.¹⁷² Part II, entitled, "Standards concerning the availability, scope and use of IPRs", addresses each intellectual property right: copyright, trademarks,

¹⁷⁰ The substantive provisions of the Paris and Berne Conventions (with the exception of Article 6 bis of the Berne Convention) and the IPIC (with the exception of a provision on compulsory license), were incorporated by reference in the TRIPS agreement.

¹⁷¹ Under national treatment the national of other member state must be given treatment no less favorable than is accorded to member's own nationals, Article 3 (1) TRIPS Agreement.

¹⁷² According to most favoured nation clause, any advantage a Member state gives to the nationals of another country must be extended immediately and unconditionally to the nationals of all other Member states, even if such treatment is more favorable than that which it gives to its own nationals, Article 4 TRIPS Agreement.

geographical indications, industrial designs, patents, layout designs of integrated circuits and trade secrets. The final section of this part concerns anti-competitive practices in contractual licenses. With respect to copyright, parties are required to comply with substantive provisions of the latest version¹⁷³ of the Berne Convention, except that they are not obliged to protect moral rights.¹⁷⁴ It ensures that computer programs will be protected under Berne Convention and stipulates on what bases data should be protected.¹⁷⁵ Rental right is also an important addition, exclusive rental rights are given to authors of computer programs and cinematographic work.¹⁷⁶ The draft also grants protection to performers, producers of sound recordings and broadcasting organizations.¹⁷⁷ Performers and producers of sound recordings would be given protection for no less than 50 years. Broadcasting organizations would have right over broadcast signals for at least 20 years.¹⁷⁸

Part III provides sets of rules that oblige member governments to ensure that rights are effectively enforced. The civil and administrative procedures and remedies are provided in the text. These include fair and equitable procedure,¹⁷⁹ and provisions on

¹⁷³ Paris Act, 1971

¹⁷⁴ Article 9 (1)

¹⁷⁵ Article 10

¹⁷⁶ Article 11

¹⁷⁷ Article 14

¹⁷⁸ Article 14 (5)

¹⁷⁹ Article 42

evidence of proof¹⁸⁰. Remedies include injunctions¹⁸¹, damages¹⁸², and disposing of or destroying the infringing good by the judicial authority by taking into account the seriousness of infringement and interest of third parties¹⁸³. Judiciary shall also have the authority to order indemnification of the defendant.¹⁸⁴ In addition, provisional measures,¹⁸⁵ special requirements related to border measures¹⁸⁶ and criminal measures¹⁸⁷ are also provided in detail. Further on in Part IV and article 62, "acquisition and maintenance of intellectual property rights and related inter-parties procedures" are spelled out. Part V entitled "dispute prevention and settlement", states that laws and regulations, and final judicial decisions and administrative rulings of general application and agreements between government and government agencies of member states – pertaining to subject matter of the agreement- shall be published. Other rules for maintaining transparency are: rules and regulations should be notified and in response to written request from a member other member should be willing to grant information referred in the agreement, or specific judicial decisions, administrative rulings or bilateral

¹⁸⁰ Article 43

¹⁸¹ Article 44

¹⁸² Article 45

¹⁸³ Article 46

¹⁸⁴ Article 48

¹⁸⁵ Section 3, Article 50

¹⁸⁶ Section 4, Article 51-60

¹⁸⁷ Section 5, Article 61

agreements.¹⁸⁸ Transition period of one year is provided in Part VI, whereas for developing countries it is four years¹⁸⁹ and for least developing countries it is ten years.¹⁹⁰ Transition period of four years is also provided for countries that are in the process of transformation and is undertaking structural reforms and facing special problems in preparation and implementation of IPR. Also developed countries, on demand and on mutual agreed terms, shall provide technical cooperation to developing and least developed member countries. Part VII and the last part states "Institutional arrangements; final provisions". It provides that Council for trade related aspects of intellectual property right shall monitor the operation of the agreement and shall carry out assigned responsibilities. Also other matters pertaining to council are discussed.¹⁹¹ The rest of the Part deals with international cooperation¹⁹², protection of existing subject matter¹⁹³, review and amendment of the agreement¹⁹⁴, reservations¹⁹⁵ and security exceptions¹⁹⁶. Pakistan is signatory to TRIPS Agreement since January 1995.¹⁹⁷

¹⁸⁸ Article 63

¹⁸⁹ Article 65

¹⁹⁰ Article 66

¹⁹¹ Article 68

¹⁹² Article 69

¹⁹³ Article 70

¹⁹⁴ Article 71

¹⁹⁵ Article 72

¹⁹⁶ Article 73

¹⁹⁷ WIPO, <http://www.wipo.int/about-ip/en/ipworldwide/pdf/pk.pdf> (accessed January 3, 2010).

2.5.3 The Universal Copyright Convention

The main object of the Universal Copyright Convention was to secure copyright relations among Berne Convention countries and non Berne Convention countries- those that have found the minimum standards of the Berne Convention too stringent and incompatible with their domestic law. Along with United States¹⁹⁸, several Latin American countries and the then Soviet Union were included in the list of non-Berne countries.

A series of international meetings held in 1947, 1949, 1950 and 1951 under the auspices of the UNESCO, framed a draft convention. The draft was submitted to an Intergovernmental Copyright Conference held at Geneva in 1952. This conference thus produced the Universal Copyright Convention signed by thirty six countries.¹⁹⁹ It came into force on September, 1955.

The final text of the Convention allowed member states to impose formalities such as notice, deposit, registration or other formal requirements. It allowed to measure term of

¹⁹⁸ In fact the first initiative to the Universal Copyright Convention began at 1928 Roman Conference of the Berne Union to create a bridge between the Berne Convention and the 1910 Buenos Aires Agreement, the Principle Pan-American treaty in the hope to include United States as a party.

Paul Goldstein, *International Copyright: Principles, Law and Practice*, 28; Kevin Garnett, *Copinger and Skone James on Copyright*, 15th ed, 1199.

¹⁹⁹ Richard S. MacCarteney, "Towards a Universal Copyright Convention", *Notes*, Second Series, Vol. 10, no.1 (Dec., 1952). 46-48.

protection from the date of publication rather than from the date of author's death. It also included Berne Safeguard clause to prevent Berne members to withdraw from convention for more convenient and relaxed terms of the Universal Copyright Convention, as clause states that if a country withdraw from Berne Convention after January 1, 1951 then work originated from it shall not be protected by the Universal Copyright Convention in the countries of the Berne Union.²⁰⁰ However, owing to the demands by economically less developed countries-who felt dejected-the clause was amended and was thus suspended for the developing countries to meet "the temporary need of some States to adjust their level of copyright protection in accordance with their stage of cultural, social and economic development."²⁰¹

Universal Copyright Convention is administered by UNESCO. The progress of the Convention is monitored by the Intergovernmental Committee of the Berne Union, which works closely with the Executive Committee of the Berne Union. The UCC was revised in Paris in 1971²⁰². 100 States are parties to the UCC since 1952²⁰³ whereas 64 States are parties of UCC as revised on 24 July 1971²⁰⁴. However UCC had lost its importance

²⁰⁰ Universal Copyright Convention, 1952 Geneva Text, Appendix Declaration Relating to Article XVII)

²⁰¹ Universal Copyright Convention, 1971, Paris Text, Appendix Declaration Relating to Article XVII)

²⁰² Kevin Garnett *Copinger and Skone James on Copyright*, 15th ed, 1200.

²⁰³ UNESCO, "Universal Copyright Convention, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI. Geneva, 6 September 1952" , <http://erc.unesco.org/cp/convention.asp?KO=15381&language=E> (accessed February 5, 2011).

²⁰⁴ UNESCO, "Universal Copyright Convention as revised on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI. Paris, 24 July 1971", <http://erc.unesco.org/cp/convention.asp?KO=15241&language=E> (accessed February 20, 2011).

years back with the accession of United States²⁰⁵ to Berne Convention and large number of developing countries over the past 25 years. UCC's importance was further reduced in 1995 when the Russian Federation became the member of the Paris Act of the Berne Convention.

Under Universal Copyright Convention each contracting state undertakes to grant same protection to unpublished and published works of the nationals of all other contracting states as it gives to the unpublished works of its own nationals. Minimum term of protection provided in the Convention is the life of the author and 25 years after his death. The contracting state is also entitled to compute the term of protection from the date of first publication of the work or from its registration prior to publication, for not less than 25 years from the date of first publication or registration. Apart from granting protection to authors and other copyright proprietors, the convention also provides that Contracting State may make exceptions to rights, provided these do not conflict with the spirit and provisions of the Convention. It is also provided that the contracting state may also make provisions for compulsory licenses to translation if translation has not been published in a language in general use in that state after the expiration of seven years from the date of first publication. Also the convention has not dictated the details of the protection and has left the mode and extent of protection on the discretion of each

²⁰⁵ March 1989.

contracting state on their own domestic legislation.²⁰⁶ Pakistan is member of UCC since April 1954 which came in to force on September 1955.²⁰⁷

2.5.4 WIPO Convention

WIPO convention is the constituent instrument of World Intellectual Property Organization (WIPO). It was signed at Stockholm on 1967 and entered into force in 1970. Later on it was amended in 1979.²⁰⁸ WIPO convention established WIPO²⁰⁹ that replaced BIRPI, the French acronym for the United International Bureau for the Protection of Intellectual Property that was established for the administration and unification of the Berne Convention for the Protection of Artistic Works and the Paris Convention for the Protection of Industrial Property.²¹⁰

WIPO was established with objectives of promoting the protection of intellectual property throughout the world and to ensure administrative cooperation among the Unions.²¹¹ In order to attain these objectives convention has laid down some functions for

²⁰⁶ Kevin Garnett, *Copinger and Skone James on Copyright*, 15th ed, 1201.

²⁰⁷ WIPO, "Treating Database", http://www.wipo.int/wipolex/en/other_treaties/remarks.jsp?cnty_id=2727C (accessed March 25, 2011).

²⁰⁸ WIPO, "Summary of the Convention Establishing the World Intellectual Property Organization", http://www.wipo.int/treaties/en/convention/summary_wipo_convention.html (accessed November 16, 2009).

²⁰⁹ Article 1

²¹⁰ Reports on International Organizations, "WIPO", An American Society of International law Publications, <http://www.asil.org/rio/wipo.html> (accessed November 16, 2009).

²¹¹ Article 3

WIPO which includes providing administrative task and encouraging conclusion of international treaties, providing legal and technical assistance in the field of intellectual property, performing administrative task to international treaties, promoting measures designed to promote efficient protection of intellectual property and maintaining services facilitating the protection and taking other appropriate action.²¹²

Membership of organization is open to states that are member to any of the Union²¹³, as well as non-Union state if it is a member of United Nations or any of its specialized agencies or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice, or it has been invited by the General Assembly of the WIPO to become part of the Convention.²¹⁴ General Assembly²¹⁵, Conference²¹⁶ and Coordination Committee²¹⁷ are three main organs established by WIPO Convention. The International Bureau is the Secretariat of the Organization.²¹⁸ There are two separate budgets of WIPO: the budget of expenses common to the Unions and budget of the Conference. The budget is financed from different sources such as gifts, bequest and subventions given to the Organization, charges due or sums received for services

²¹² Article 4

²¹³ Union is defined in Article 2(vii) as

the Paris Union, the Special Unions and Agreements established in relation with that Union, the Berne Union, and any other international agreement designed to promote the protection of intellectual property whose administration is assumed by the Organization.

²¹⁴ Article 5

²¹⁵ Article 6

²¹⁶ Article 7

²¹⁷ Article 8

²¹⁸ Article 9

rendered by the International Bureau, contribution of the States party to the Convention or Unions.²¹⁹ The organization may conclude bilateral and multilateral agreements with other member states and enjoy on the territory of each state such legal capacity as is necessary for the fulfillment of the Organization's objectives and for the exercise of its functions.²²⁰ Pakistan accessed to WIPO Convention on October 1976, which came into force on January 1977.²²¹

WIPO Internet treaties named WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)²²² are two important conventions but Pakistan is not member of any of them yet.

²¹⁹ Article 11

²²⁰ Article 12

²²¹ WIPO "Treating and Contracting Parties", http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=121C (accessed November 16, 2009).

²²² WIPO, "Wipo Internet Treaties", http://www.wipo.int/copyright/en/activities/wct_wppt/wct_wppt.html (accessed February 23, 2010).

CHAPTER 3

ISLAMIC PERSPECTIVE

[Definition and Explanation of Basic Concepts regarding Copyright Laws, Conclusive Opinions of Scholars]

3.1 Meaning of Copyright in Islamic and Arabic Literature

Several terms are used for copyright in Arabic and Islamic literature. Some of the commonly terms used are:

huqoq al taleef wa nashr, haqq al moulaf, haqq al ibtikar, haqoq al adabia

Before proceeding towards technical meaning of copyrights as stated by Islamic Scholars, literal meaning of the terms used for copyright are stated below. All these terms starts with prefix *haqq*, so it is important to first define the term *haqq* literally as well as juristically.

3.1.1 Literal Meaning

As stated above all the terms for copyright in Arabic and Islamic literature are affixed with *haqq*, so first of all *haqq* is explained then subsequently *taleef wa nashr, moulaf, ibtikar, adabi* are defined.

HAQQ: The term used in Arabic for right is *haqq* (pl.*huquq*)

Haqq is considered multivalent or has various meanings in Arabic language. It can be both a noun and an adjective. It means 'truth or certainty', and is an antonym of

falsehood²²³. When it is used with definite article (al), *al-haqq* is name for God (The Truth)²²⁴, it refers to 'rightness' and also 'true', 'right', 'correct', claim, duty,²²⁵ it may also refer to property, justice, and that which wisdom or prudence brings about²²⁶, it also implies that which is due and thing decreed,²²⁷ depending on context and use of the word in a specific context.²²⁸

Haqq has also been used in various verses of the Quran, Allah (swt) said:

- "The Word is proved true against the greater part of them: for they do not believe"²²⁹
- "That He might justify Truth and prove Falsehood false"²³⁰
- And say: "Truth has (now) arrived, and Falsehood perished: for Falsehood is (by its nature) bound to perish."²³¹

²²³ *Batil*.

²²⁴ Abu Fayd Muhammad Murtada al-Husayni al-Zabidii, *Taj al-'Urus min Jawahir al-Qamus* 13:80 (Dar al-Fikr 1994); E.W Lane, *Arabic-English Lexicon* 1:607 (Islamic Texts Socy.1984) quoted in Anver M. Emon, "Natural Law and Natural Rights in Islamic Law", *Journal of Law and Religion*, Vol. 20, No. 2 (2004 - 2005), 351-395, 379 .

²²⁵ Ian Richard Netton, *A popular dictionary of Islam*, revised ed, (Surrey: Curzon Press, 1997), 96.

²²⁶ Abu Fayd Muhammad Murtada al-Husayni al-Zabidii, *Taj al-'Urus min Jawahir al-Qamus* , 13:79-80 quoted in Anver M. Emon, "Natural Law and Natural Rights in Islamic Law", 380.

²²⁷ Thomas Patrick Hughes, *A dictionary of Islam* (Lahore: Premier Book House, n.d).

²²⁸ Ebrahim Moosa, "The dilemma of Islamic Rights Schemes", *Journal of Law & Religion*, Vol.15, No. 1/2, (2000-2001), 191.

²²⁹ Al Qur'an 36:7

²³⁰ Al Qur'an 8:8

²³¹ Al Quran 17:81

- "For divorced women Maintenance (should be provided) on a reasonable (scale).

This is duty on the righteous."²³²

- "And Allah will judge with (justice and) Truth"²³³

Haqq is also used for specific share in Quran:

- "And those in whose wealth is a recognized right. For the (needy) who asks and him who is prevented (for some reason from asking)"²³⁴

Juristic meaning: Ibn Abidin defined *haqq* as 'entitlement of person to a thing'.

According to Mustapha Zarqa, *haqq* is 'a specialization because of which *Sharee'ah* accepts any authority or duty' or 'right is specialization determined by *Shariah* in the form of power or obligation'. Ibne Nujaym argued that 'right is competence and capacity conferred upon an individual or a collective entity'.²³⁵ Ali Al Khafif defined *haqq* as 'legitimate interest' or 'it is an interest (*maslaha*) that is authorized by law'. Abu Sana

²³² Al Quran 2: 241

²³³ Al Quran 40:20

²³⁴ Al Quran 70:24-25

²³⁵ Muhammad Fathi Uthman, *Taqrir Huquq al-Insan bayna al-shariah al-Islamiyya wa'l Fikr al Qanun al Gharbi* 555 ,2^d, ed., (n.p:Wazarat al-Ta'lim al 'Ali, 1978) quoted in Ebrahim Moosa, "The dilemma of Islamic Rights Schemes", *Journal of Law & Religion*, Vol.15, No. ½, (2000-2001), 191.

has defined right as 'one that is established under *Shariah* for human beings or Allah (swt) against other.²³⁶

'Taleef wa nashr'

Taleef

Alafa-yualifu-taleefan

To bring together in harmony; to compile (a dictionary)²³⁷

Wa

And, too, also; with, by²³⁸

Nashr or N`asr

An oration, a prose composition²³⁹, spreading, publishing.²⁴⁰

'Ibtikar'

Ibtikar-yabtakir-ibtikaran

To be the first to do a thing; to originate; to be first (in doing something).²⁴¹

Mouallif

²³⁶ *Al nazriat al ama* by Ahmad Fahms Abu Sana quoted in Dr.Ali Mohudin Ali Kara Daghi, *bahos fil ma'malat al ma'sara*, (Beirut: Dar al bahair al Islamia, 2001), 396.

²³⁷ Hasan S.Karmi, *Al-mughni al-wasit*, 2nd ed, (Lebnon: Librairie du Liban, 2001),11.

²³⁸ Joseph Cataphago, *An English and Arabic Dictionary*, (London: Bernard Quaritch, 1858), 302; F.Steingass, *Arabic-English Dictionary*, (New Delhi: Asian Educational Services, 1993), 1191.

²³⁹ Joseph Cataphago, *An English and Arabic Dictionary*, (London: Bernard Quaritch, 1858), 291.

²⁴⁰ F.Steingass, *Arabic-English Dictionary*, (New Delhi: Asian Educational Services, 1993), 1120.

²⁴¹ Hasan S.Karmi , *Al-mughni al-wasit*, 35.

An inventor, author²⁴²

Adabiyy, Adabiyya

Adabiyy: Literary; mannerly; moral;²⁴³ polite, well-educated²⁴⁴

Adabiyya-t, pl: literature, pl. what promotes civilization and refinement, accomplishments.²⁴⁵

3.1.2 Scholastic meaning of Copyright

Copyright has been defined in Sheikh Munajid's website as "one of the intangible rights that are protected by *sharee'ah*."²⁴⁶ According to Sheikh Muhammad Baazmool: "It is an established right owned by the writer, translator, or the one who provides any type of service (to some knowledge). He legitimately owns the right of the work that he has done."²⁴⁷ Justice Taqi Usmani has explained the meaning of copyright by stating:

if a person has written a book he is the exclusive owner of the right to publish it, and nobody has any right to publish that book without his permission...it is also implied in

²⁴² Joseph Cataphago, *An English and Arabic Dictionary*, (London: Bernard Quaritch, 1858), 359.

²⁴³ Hasan S.Karmi, *Al-mughni al-wasit* ,6.

²⁴⁴ F.Steingass, *Arabic-English Dictionary*, (New Delhi: Asian Educational Services, 1993), 22.

²⁴⁵ *Ibid.*

²⁴⁶ <http://www.islam-qa.com/index.php?pg=print&ref=995588In=eng>

²⁴⁷ Sheikh Muhammad Baazmool, *Sheykh Muhammad Baazmool on Copyrights on Translations and Research, Other Matters Related to Intellectual Property Rights in Islam*, <http://www.bakkah.net/interactive/q&a/aamb080-copyrights-translations-intellectual-property.htm> (accessed December 15, 2009).

this theory that the owner of such rights can sell them to others like any other tangible objects. The law of "copyright" has come into existence in order to secure such rights".²⁴⁸

The Majlis Ulama of South Africa have given a very interesting definition of copyright by calling it a concept of infidels:

Copyright is a *kuffar* concept of 'property' belonging to a *kuffar* -originated class of 'property' which they term 'Intellectual Property' In simple terms it is a right which the *kuffar* legal system confers to a person who write a book or any article. The intangible, abstract, untouchable-not physical-idea in the mind of a man is defined in the queer and unnatural concept of intellectual property as an entity which has the status of material or tangible or physical property, like bread and butter. In simpler terms the concept of copyright is a legal right which *kuffar* give to copyright in a legal right which *kuffar* give to a man who writes a book. It is purely a pecuniary right or a right to make money by preventing others from exercising their lawful *Shari* right.²⁴⁹

Shanqeete has stated that by literary rights of author meant sum of privileges that are obtained by him (author) and that stands as property; and monetary right of author are material price of its scriptures and that is determined by benefits or profits, which are obtained by publication of literary work and its investments. Dr. Wahbah-e-Zuhayli has

²⁴⁸ Taqi Usmani, *Copyright According to Shariah* , <http://www.albalagh.net/qa/copyright.shtml> (accessed September 2009).

²⁴⁹ Mujlisul-Ulama of South Africa, *The Shariah and Copyrights, Patency Rights and Jaahiliyyah Rights*. (South Africa: Young Men's Muslim Association), http://www.themajlis.net/books-index-request_book_details-bkid-28.html (accessed September 2009).

stated that it is literary right that is justified as right on the basis of doctrine of public interest and *istislah*.²⁵⁰

3.2 Fundamental Concepts

Before proceeding further it is important to discuss following important concepts in Islamic law regarding copyright. These basic concepts will also be debated in the arguments of the proponents and opponents.

3.2.1 Property

The word used for property in Islamic law is *mal* (plural-*ammwal*). 'Mal' or its derivatives is mentioned more than 90 times in Quran, though it has not been defined anywhere in the Quran and Sunnah.²⁵¹ *Mal* is defined literary in *Qamos* as: 'mal is known as all things capable of being owned.'²⁵² It is defined in the glossary: "A thing that is naturally desired by man, and can be stored for times of necessity; it has use and it is

²⁵⁰ Dr. Wahbah-e-Zuhayli, *Al-Fiqh al-Islami wa adillahtohu*, vol.4 (Quetta: Maktaba Rasheedia, n.d), 2861.

²⁵¹ Maulana Khalid Saif Allah Rahmani, "Mal kee haqeeqat aur haqooq ke khareed u farokhat," *haqooq ke khareed u farokhat murabaha, Islami banking*, Ed. Mujahid ul Islam Qasmi (Karachi: Adaratul Quran wa aloom ul Islamia, 2004), 29.

²⁵² Muhammad bin Muhammad bin Abdul Razaq al-Husainy, Abu al-Fayed, al Malqab, *Taj Al-'Aroos Min jawahir Al-Qamoos* see entry mol, vol 30, (n.p: dar al hadaya, n.d), 427.

permissible by the *Shariah* to enjoy its benefit"²⁵³. Most of the lexicographers have defined it as 'a desired thing'²⁵⁴

There are three things by which humans can take benefit. These are *'ain*, *manfa`ah* and *haqq*.

'Ain (Corporeal): It refers to a property that has a physical existence.

Manfa`ah (usufruct): It refers to some kind of benefit that may be utilized in a special way. For example: dwelling in a house.

Haqq (right): It indicates a special right over an especial property. For example right over route or *haqq al marrar*.²⁵⁵

There is consensus of scholars that *'aiyan* are *mal* and it is permissible to buy and sell them and also *huqooq* that are not related to property are not *mal*. However there is difference of scholars regarding *manfa`ah*, and those *huqooq* that are related to property. According to majority of scholars *manfa`ah* and *huqooq* related to property are *mal*

²⁵³ Ahmad Sanusi Husain, "Glossary of Islamic Finance Terms", <http://www.scribd.com/doc/20005767/Glossary-of-Islamic-Finance-Terms-Compiled-by-Ahmad-Sanusi-Husain> (accessed February, 2010).

²⁵⁴ Taj al uroos, Mukhtar al-Sahah ;see also Abu Fayd Muhammad Murtada al-Husayni al-Zabidii, *Taj al-Urus min Jawahir al-Qamus* (Dar al-Fikr 1994).

²⁵⁵ Mahdi Zahraa and Shafaai M Mahmood, "Definition and scope of the Islamic concept of sale of goods" *Arab Law Quarterly*, Vol.16, No.3 (2001), 215-238.

whereas according to Ahnaf they are not *mal*.²⁵⁶ Definition of *mal* in each school of thought is discussed below.

Among Shafi scholar, Al-Zarkshi has defined *mal* as “*mal* is what gives benefit, which is prepared to give benefit, it can be material objects or usufructs”.²⁵⁷ Sayuti states that ‘the term *mal* is to be applied on anything that has (material) value, that can be sold (become subject matter of sale), its tortfeasor will be liable to pay compensation; nevertheless if it is minute, that is not left abandoned by people, for example money and other things similar to it’.²⁵⁸

Also according to Hanabila it is not important for *mal* to be among corporeal object (*cain*). Ibne Qudamah a famous Hanbali jurist has defined *mal* by stating that ‘*mal* is that which contains usufruct (*manfa`ah*) which is permissible without any necessity or requirement for example immovable good, camel, silk cloth, hunting worms like insects; and that which has impermissible usufruct (*manfa`ah*) like wine or that which is not permissible except on necessity like dead or that is not permissible except on desire is not *mal*’²⁵⁹. Thus Ibn Qudamah has chosen ‘beneficial nature’ of object as key criteria.

²⁵⁶ Maulana Khalid Saif ullah Rahmani, *jadeed fiqhī masail*, vol 4, (Karachi: Zamzam publishers, 2005), 149.

²⁵⁷ Al-Zarkhsī, *Al-Manthur fi al-Qawa'id al-Shar'iyyah*, vol. 3 (Kuwait: Wazarah Al-Awqaf Al-Kuwaitiya, 1985), 222. See also Ahmad Hassan, *tarjīf al-mal indal ulama al-Shari'ah*

²⁵⁸ Al-Sayuti, *Al-Ashbah wa al-Nazair*, (n.p: Dar Al-Kutub Al-Ilmia, 1990), 327.

²⁵⁹ Ibn Qudamah, Abu Muhammad, *Al mughnī fi al-Fiqh*; for Urdu translation see “Mal kee haqeeqat aur haqooq ke khareed u farokhat,” *haqoq ke khareed u farokhat murabaha, Islami banking*, 73.

However such beneficial nature should be permissible by *Shariah* and it should not come under the circumstances of necessity (*al-darurah*).²⁶⁰

Malikkis have also accepted *manfa'ah* as *mal*, though with some concern. Maliki jurist (*fiqhi*) Abu Qasim has accepted taking *manfa'ah* as dowry (*mahar*), others have stated that is abhorrent (*makro*) to take *manfa'ah* as *mahar*, however if it is taken as *mahar* then *mahar* shall be accepted and women shall be entitled to it. It is stated in *al-Fiqh ala al-madhab al-arbah* that there is difference of opinion upon *manfa'ah* like teaching Quran, or residing in house. According to Imam Malik they do not have the ability to form *mahar* from the very beginning and originally, whereas according to Ibne Qasim they can constitute *mahar* but with *karaha*²⁶¹, while some of the Maliki jurists (*fugaha*) have allowed it without *karaha*.²⁶² Abu Ishaq Shatibi, a Maliki scholar, has defined *mal* in these words: *Mal* is something that is capable of 'being owned, and whose owner has authority over it'.²⁶³

Classical Hanafi *fugaha* have differed from the majority. According to them *mal* is limited to corporeal objects only. Ibn 'Abidin al-Shami, a Hanafi scholar, has defined *mal* as that 'towards which (human) nature inclines, and is possible to store for future

²⁶⁰ Mahdi Zahraa and Shafaai M Mahmood, "Definition and scope of the Islamic concept of sale of goods" *Arab Law Quarterly*, Vol.16, No.3 (2001), 215-238.

²⁶¹ Abd al-Rahman Ibn Muhammad Awd al-Juzairi, *Al Fiqh Ala al-Madhab al-Arba'ah*, vol.4 'Kitab al-nikah (Beirut: Dar al Katab, 2008), 99.

²⁶² abhorence

²⁶³ Al-Shatibi *Al mawafaqa*, vol. 2 (n.p: Dar Ibn Affan, 1997), 32.

needs'²⁶⁴, also Shami has stated by reference to *Talweeh* 'which has the status of being stored for the purpose of beneficial use during the time of necessity',²⁶⁵ Shami has also defined *mal* by referring to *Bahar* from *Hawee Qudsee* as 'which has been created for goodness of human beings and in regard of which scarcity and stinginess apply'²⁶⁶

It is stated that as most of the scholars have restricted *mal* to something that can be stored. They have restricted it to corporeal objects, most probably, because at that time no other thing other than 'ain or corporeal objects had this ability.²⁶⁷ *Majallah al-Ahkam al-Adliyyah*²⁶⁸ also defined *mal* as "a thing which is naturally desired by man, and can be stored for the time of necessity. It includes movables (*manqul*) and immovable (*ghayr manqul*)"²⁶⁹ *Majallah* further defines *mal mutaqawwim* as "a thing the benefit of which is permissible to enjoy" and "property acquired".²⁷⁰

²⁶⁴ Ibn Abidin, *Hashiah Rad al Mukhtar ala al-Dur al Mukhtar*, vol. 4 (Beirut: Dar-ul-Fikr, 1992), 501.

²⁶⁵ Al-Taftazani, *Sharh Al-Talweeh Ala Al-Tawzeeh*, vol. 1 (Eqypt: Maktaba Sabih Bi'misr, n.d), 327, see also translation by Muhammad Wohidul Islam, "Al-Mal: The Concept of Property in Islamic Legal Thought" *Arab Law Quarterly*, Vol. 14, No.4 (Netherlands: Kluwer Law International, 1999), 362.

²⁶⁶ Ibn Abidin, *Hashiah Rad al Mukhtar ala al-Dur al Mukhtar*, vol. 4 (Beirut: Dar-ul-Fikr, 1992), 502.

²⁶⁷ Muhammad Wohidul Islam, "Al-Mal: The Concept of Property in Islamic Legal Thought" *Arab Law Quarterly*, Vol. 14, No.4, 363.

²⁶⁸ Known as *Majallah, Mejelle*

²⁶⁹ Tyser, C.R, *The Mejelle* (Eng.Trans), Article 26 quoted in Muhammad Wohidul Islam, "Al-Mal: The Concept of Property in Islamic Legal Thought" *Arab Law Quarterly*, Vol. 14, No.4, 363.

²⁷⁰ There are three conditions for *mal* to be *mutaqawwam*: It should be permissible in *Shariah*, it should be capable of being used, and it should be customarily treated as property or of proprietary value.

These are the credible definition of *mal* among the Ahnafs, however there is difference on this definition both among the classical as well as modern Ahnafs. Author of Hidaya has stated that according to Imam Muhammad services are also included in *mal*. Thus if husband makes *mahar* of serving his wife then according to Imam Muhammad *mahar* in itself will be termed right but as it is contrary to norms therefore it will be obligatory to pay its value.²⁷¹ Kasani has allowed all *manafa`ah* to be termed as *mahar* and has given evidence by stating that 'manafa`ah are either *mal* or they have the status of *mal*'.²⁷² Ibne Najam has also stated the same thing in Bahar al-raiq.²⁷³

3.2.2 Ownership

The term used for ownership under Islamic law is *milkiyah* or *milk*. *Milkiyah* or *milk* is defined as 'the relationship between person and property that has been established by the *shariah*, that gives absolute control over it; and there is nothing that prevents its control'. It is also defined as "exclusive control over thing to the exclusion of others, and it is possible for the owner to exercise control over it from the beginning as long as there is no *shari* restriction".²⁷⁴

Obaidullah bin Masood states: "the relationship that exists between a person and a thing that gives absolute control and right of disposal over it to the exclusion of

²⁷¹ Maulana Khalid Saif ullah Rahmani *jadeed fiqhī masail*, vol 4, (Karachi: Zamzam publishers, 2005),155.

²⁷² Ibid quoted from *Badaya al Sana*.

²⁷³ Ibid., 156.

²⁷⁴ Wahbah al-Zuhaili, Dr, *Al Fiqh al-Islami wa Adillatuh*, vol.6 (Quetta: Maktaba Rasheedia, n.d), 4545.

others”²⁷⁵. Al-Qarafi, Maliki jurist, has stated: “Ownership is a *hukm Shari* that is assigned to the *‘ain* and *manfa‘ah* that enables the one with whom it is associated to benefit from the thing owned and to take control-value for it.”²⁷⁶ Ibne Tayamma from the Hambali school defined it in *Majmoa al-Fatawa* as ‘Ownership as a legal authority justifying the right of disposal’²⁷⁷. Article 125 of *Majallah al-Ahkam al-Adliyyah*²⁷⁸ defined *milk* as “a thing of which man has become the owner, whether it be the things themselves (*a‘yan*) or whether it be the use (*manfa‘ah*).”

3.2.3 Sale

Term used for sale in Islamic law is *bay*.

Literal definition: *Bay* refers to exchange, that is to exchange one thing from another because all buying and selling are exchange of things in the real sense that's why they are called *bay*. Though in common custom *bay* is applied for selling but in literary sense this word is among those words that has two contrary meanings, that is *bay* refers to both sale and purchase.²⁷⁹

²⁷⁵ Translation taken from Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, (Islamabad: Advanced Legal Studies Institute, 2005), 213.

²⁷⁶ Al_Qarafi, *al Furuq*, (Beirut, 1343), vol.3, 209.

²⁷⁷ Ibne Tayyama, *Majmoa al-Fatawa*, vol 7, (Madina: Majma al Malak al Fahad li taba' al mashaf al-sharif, 1995), 48.

²⁷⁸ Known as *Majallah*, *Mejelle*.

²⁷⁹ Ibn Manzur, *Lisan al Arab*, (Beirut, Dar Saadar, 1993) see entry *ba-ya-a'*

Juristic definition: *Bay* has been defined in Hanafi fiqh book *Multaqi al bahar* as 'exchange of *mal* for *mal*'.²⁸⁰ Same definition is also stated in article 105 of 'Majallah al ahkam al adliaya'. It is defined in *Badaya wa sana* and *Dar mukhtar* as 'exchange of desired thing by desired thing'.²⁸¹ Contrary to it 'by consent' is added in the definition of 'exchange of *mal* by *mal*' in *Kanza daqeeq*²⁸², *Fath al qadeer* and *Fatawa Alamgiri*.²⁸³ Along with consent some Hanafi scholars have added in 'exchange of *mal* by *mal*' the words 'by way of earning or by ownership'. Mula Khusro has defined *bay* in his book *Dar al ahkam*²⁸⁴ as 'exchange of *mal* by *mal* by way of earning'.²⁸⁵

²⁸⁰ Ibrahim bin Muhammad bin Ibrahim al Halbi al Hanafi, *Majma al Nahar fi shar Multaqa al bahar*, (Beirut: Dar al Kutab al Ilmia, 1998), 4.

²⁸¹ Ala al deen, Abu Bakr bin Masood bin Ahmad al Kasani, *Bidaya al Sana fi tarreeb al Sharai*, vol.5 (Beirut: Dar al Kutab al Ilmia, 1986), 133; Ibne Abadeen, *Rad al Muhtar ala dar al Mukhtar*, vol.4, (Beirut: Dar al Fikr, 1992), 501.

²⁸² Usman bin Ali bin Muhjan al bari, Fakharu din al Zalee, *Tabayan al Haqaiq Sharh Kanz al daqiq wa hashia al shibli*, vol 4, (Cairo: al Matba al Kubra al Ameeria, 1313AH), 2.

²⁸³ Ibne Abadin has given beautiful argument on this issue by stating that it is not reasonable to mention consent in the definition of *bay*. Actually consent is not part of *shari* sale but is condition for its effect because if consent would have been part of it in shariah then *bay mukra* would have been termed *batil* however this is not the case and it has been termed *fasid*.

²⁸⁴ Muhammad bin Qaramarz Ali al Shaheer, *Dar al Ahkam Sharh Qarar al ahkam*, vol 2, (n.p: Dar al Haya al Kutab al Arbia, n.d), 142.

²⁸⁵ It is limited by adding way of earning so that gift can be excluded from the definition of *bay*.

Shafi *fuqaha* usually use words against *mal* instead of exchange of *mal*. Allama Nawa has defined *bay* in al Majmoo²⁸⁶ as 'under Shariah, *māl* against *mal* or others by (way of) ownership'. Al Hasanee has defined *bay* in Kifaya tul ahkhyar as "(transfer of) *mal* against *mal* that are capable of being possessed, by way of offer and acceptance under permissible way"²⁸⁷. Ar ramli has defined *bay* in Nahaya tul muhtaj as 'Under Shariah it is contract which is found against *mal* by *mal* with the condition of benefiting *milk`ain* or everlasting *manfa`ah*'.²⁸⁸

Among Maliki jurists Ibn e Rushd has defined *bay* in Muqadama as 'exchange of ownership by value'. Ibne Urfa has defined it as '*bay* is common contract on consideration exempted from it are in which there is no benefit or gain of pleasure'.²⁸⁹ Whereas Zarqani, while narrating different types of sale, has also stated among types of sale: sale of benefit or *manfa`ah*. He has stated ' *bayo* (sales) is plural of

²⁸⁶ Abu Zakaria Muhye din bin Sharaq al Nawee, *Al majmoo Sharh al Madhab*, vol 9, (n.p: dar al fikr, n.d), 145.

²⁸⁷ Abu Bakr bin Muhammad bin Abdul Momin bin Hareez bin Mauly al Haseene al Husni, Taqi ud din Shaafi, *Kafaya tul ahkhyar fi hal ghaya tul ikhtasar*, vol 1, (Damascus: Dar al Khayr, 1994), 232

²⁸⁸ Shams ud din Muhammad bin abi al Abbas bin Hamza Shahabudin ar ramli, *Nihaya al Muhtaj ila Shar al Manhaj*, vol. 3, (Beirut: Dar al Fikr, 1984), 372.

²⁸⁹ Ibn e Urfa has stated this definition after criticizing Ibn e Rushds definition of *bay*. According to him Ibne Rushd definition is also applicable on *nikah* and *ijara*, which is not included in *bay*. Thus Ibne Urfa has stated without benefits and gain of pleasure to exclude *ijara* and *nikah*; Muhammad bin Qasim al Insari, Abu Abdullah, *al Hadaya al Kafyia al Shafia labayan haqaiq Imam ibne Urfa al waqia (sharh hadood ibne Urfa lirada*, (n.p: al maktaba al ilmia, 2003), 232.

bay (sale), it is plural because it has different types like *bay* of *'ain* (corporeal object), *bay* of *dayn* (debt) and *bay* of *manfa'ah* (benefit).²⁹⁰

Among Hambali jurists Ibne Qudama has defined *bay* in al Muqny as "exchange of *mal* for *mal* for the purpose of ownership."²⁹¹ Later on another Hambali scholar al Mardawee has given a different definition of *bay* in Insaf of wajeez as 'exchange of *'ayan* or permissible *manfa'ah*, absolutely, by any one of them for eternity, however it should not be *riba* or debt.'²⁹²

²⁹⁰ Muhammad bin Abdul Baqi bin Yusuf al Zarqani al Masry al Azhari, *Sharh Zarqani ala Mouata Imam Malik*, vol 3, (Qairo: Maktaba al Saqapha al deenia, 2003), 379.

²⁹¹ Ibne Qudama, *al Mughny la ibne Qudama*, vol.3, (Cairo: Maktaba al Qaira, 1968), 480.

²⁹² Alau din Abu Hassan Ali bin Sulyaiman al Mardawee al Damashqee, *al Insaf fe Marfa al rajha min khalaf*, vol.4, (n.p: dar al haya al turas al arabi. n.d), 260.

CHAPTER 4

OPINION OF ISLAMIC SCHOLARS

Scholars are divided regarding legality of copyrights. Their views can be classified under three categories:

1. Copyrights are justified
2. They are not justified for Islamic literature
3. They are not justified at all.

4.1 Proponents of copyright in Islam

Votaries of copyright are more than its opponents. Most of the credible contemporary scholars have justified it. Among them are Ali al Khafif²⁹³, Fatih al

²⁹³ Dr. Engku Rabiah Adawiah Engku Ali, *Islamic Finance : Dynamics and Development: Proceedings of the Fifth Harvard University on Islamic Finance*, "Re-Defining Property and Property Rights in Islamic law of Contract", (Cambridge, Massachusetts: Centre for Middle Eastern Studies, Harvard University, 2003), 54.

Duryani, Whaba al Zuhayli, Sheikh Abdul Aziz bin Baz,²⁹⁴ Justice Taqi Usmani, Sheikh Muhammad bin Saleh al-'Uthaimeen²⁹⁵ scholars at OIC Fiqh Academy²⁹⁶ and also judges of Federal Shariat Court of Pakistan have justified copyrights in their respective decisions. They have justified copyrights by giving the following arguments:

4.1.1 Analogy over accepting memorization of part of Quran as *mahr*

Under Islamic law husband has to give his wife gift (dowry/*mahr*) from his *mal* upon conclusion of marriage contract. During Prophets Era a marriage case between *Khawla* and an *Ansar* man was reported with *mahr* of teaching bride some Quranic verses.²⁹⁷

Narrated Sahl bin Sad As-Sa'idi: A woman came to Allah's Apostle and said, "O Allah's Apostle! I have come to give you myself in marriage (without *Mahr*)."²⁹⁸ Allah's Apostle looked at her. He looked at her carefully and fixed his glance on her and then lowered his head. When the lady saw that he did not say anything, she sat down. A man from his companions got up and said, "O Allah's Apostle! If you are not in need of her, then marry her to me." The Prophet said, "Have you got anything to offer?" The man said, "No, by Allah, O Allah's Apostle!" The Prophet said (to him), "Go to your family and see if you have something." The man went and returned, saying, "No, by Allah, I have not found anything." Allah's Apostle said, "(Go again) and look for something, even if it is an iron

²⁹⁴ Muhammad Saed Abdul-Rahman, *Islam: Questions and Answers, Jurisprudence and Islamic Rulings: Transactions-Part 6*, Vol.27 (London: MSA Publication Limited, 2004), 89.

²⁹⁵ Ibid., 90

²⁹⁶ Qaraar Majlis al-Fiqh al-Islami al-Khaamis, 1409 ,www.islam-qa.com

²⁹⁷ Mahdi Zahraa and Shafaai M Mahmood, "Definition and Scope of the Islamic Concept of Sale of Goods", *Arab Law Quarterly*, Vol.16. No.3, (2001) , 219.

ring." He went again and returned, saying, "No, by Allah, O Allah's Apostle! I could not find even an iron ring, but this is my *Izar* (waist sheet)." He had no *rida* (*rida* is piece of cloth used as an upper garment). He added, "I give half of it to her." Allah's Apostle said, "What will she do with your *Izar*? If you wear it, she will be naked, and if she wears it, you will be naked." So that man sat down for a long while and then got up (to depart). When Allah's Apostle saw him going, he ordered that he be called back. When he came, the Prophet said, "How much of the Quran do you know?" He said, "I know such *Sura* and such *Sura*," counting them. The Prophet said, "Do you know them by heart?" He replied, "Yes." The Prophet said, "Go, I marry her to you for that much of the Quran which you have."²⁹⁸

By virtue of this verse it is clear that something intellectual or intangible can be subject matter of *mahr* whereas the origin of *mahr* is *mal*. As it is stated by Allah (swt) in the following verse of Surah Nisah:

Also (forbidden are) women already married, except those (captives and slaves) whom your right hands possess. Thus has Allah ordained for you. All others are lawful, provided you seek (them in marriage) with *Mahr* (bridal money given by the husband to his wife at the time of marriage) from your property, desiring chastity, not committing illegal sexual intercourse, so with those of whom you have enjoyed sexual relations, give them their *Mahr* as prescribed; but if after a *Mahr* is prescribed, you agree mutually (to give more), there is no sin on you. Surely, Allah is Ever All-Knowing, All-Wise.²⁹⁹

²⁹⁸ Sahih Bukhari, Volume 7, Book 62, Number 24 ,

http://www.quranenglish.com/hadith/sahih_bukhari/062.htm

²⁹⁹ Al-Quran 4:24

4.1.2 Analogy over taking money while doing treatment from Quran

Companions of the Holy Prophet (May peace and blessings of Allah be upon Him) took compensation while doing treatment from Quran and Prophet (May peace and blessings of Allah be upon Him) approved it.

It was narrated from hadith of Abu Said that some of the companions of Holy Prophet (May peace and blessings of Allah be upon Him) on their way to journey reached some of the Arab tribes. They asked the tribe to treat them as guests but they refused. Thereafter the tribal chief was bitten by a snake or stung by a scorpion. When they could not treat him with all their efforts, they went to the companions and asked them if they have got them any treatment. One of them replied that he knew the treatment but he will take something as compensation as they had refused to treat them as guests earlier. They agreed on flock of cheap. One of them recited and puffed Surah Fatiha over the chief who became perfectly alright. Before dividing their earnings they went to Holy Prophet (May peace and blessings of Allah be upon Him) and narrated the whole story. Allah's Apostle said "You have done the right thing." Then he added, "You have done the right thing. Divide (what you have earned) and assign a share for me as well."³⁰⁰

³⁰⁰ Shahih Bukhari, Volume3, Book 35 (Hiring), Number 476 also Volume 7, Book71(Medicine), Number 476 , <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari>

Prophet (May peace and blessings of Allah be upon Him) approved taking compensation while reciting Surah Fatiha as treatment. Surah Fatiha is intangible so is copyright. Therefore the hadith gives justification taking money for copyrights.³⁰¹

4.1.3 Definition of *mal* is not static

Mal is not defined anywhere in the Quran and *Sunnah*. However it is defined by different jurists and each one of them has defined it in their own lights. Therefore difference of views among the scholars on the definition was natural. However this shows that there cannot be static definition of *mal* and no one opinion can bind for all times to come in the likelihood of changes in the world.³⁰²

4.1.4 Knowledge is *manfa`ah* and *manfa`ah* is *mal*

Holy Prophet (May peace and blessings of Allah be upon Him) said “when the son of Adam dies all his good deeds come to an end except three things: ongoing charity, beneficial knowledge, or a righteous son who will pray for him”³⁰³. Thus knowledge is deed and source of *manfa`ah* in *Shariah*. It affects remains even after the death of creator.

³⁰¹ Bakr bin Abdullah Abu Zaid, "Haq al taleef tarekhan wa hukman", *Fiq al Nawazil*, vol 2, (Beirut: Moasasa al Risala, 1996), 181.

³⁰² PLD 1983 Federal Shariat Court 125, p.137.

³⁰³ Narrated by Muslim, Abu-Dawood, al-Trimidhi, and by al-Bukhaari in al-Adab from al-Mufrad from Abu Hurayrah.

Mal is everything in which there is permissible *manfa`ah* without any want or necessity. It means requirement for *malia* things is not material *ayni* thing but *manfa`ah* and its effects. In fact anything that does not have *manfa`ah* is not *mal*, even if the thing is *ayni*. Thus the standard of *malia* is *manfa`ah* not *aynia*. Value revolves around *manfa`ah*, which is its origin and source. *Manfa`ah* is intangible. Thus where there is *manfa`ah* there is value.³⁰⁴ As *manfa`ah* is *mal*, so is copyright because it is also *manfa`ah*.

4.1.5 Analogy over permissibility for an *Imam* to work on salary

It is impractical not to give any incentive to person to write books and impart knowledge. In fact on this account it has been made permissible for an *Imam* or a religious teacher to work on salary.³⁰⁵ The general rule in Hanafi school of thought is on the impressibility of taking wages on *ta'at* or pious work. However late Ahnaf had given permissibility over taking wages for *ta'at* like *azaan*, *aqama* and teaching Quran. This is because if *ta'at* would not have been made permissible then people would not have adopted those works and subsequently hindrance or obstacle in the knowledge of Quran and other religious matters would be inevitable.³⁰⁶

³⁰⁴ "Haqooq al-milkia al-fikria wa himaya al-mustahlik wa ikhlaqiyatia", *Majala al-Shariah wa darasat al-Islamia*, Vol 63, (December 2005), 282-283.

³⁰⁵ *Darrul Mukhtar*, Volume IV, 34 quoted in PLD 1983 Federal Shariat Court 125, p.137.

³⁰⁶ Abdul al-Hammed Tahmaz, "haq al-ta'leef wa al-tauzee wa al-nashr wa al-tarjama", *Haq al ibtikar fi al-fiqh al islami al muqaran*, Fathih al Darenied, (Beirut: Mu'assat al risalah, 1987), 174.

4.1.6 Analogy over taking compensation for performing *Hajj* and *Umrah*

Majority of scholars have permitted taking money for the one who is appointed to do pilgrimage on account of someone else, even if money paid to him is in excess of his expenditure on performing pilgrimage. Therefore proponents of copyright have drawn an analogy between taking compensation for performing *Hajj* and *Umrah* and taking compensation for copyrights.³⁰⁷

4.1.7 Muslims are bound by their conditions

It is not permissible to infringe copyrighted material because its owner or author has disallowed it before making it available to the public. Likewise a person has bought the copyrighted material on condition not to infringe it. It is stated in Quran: "O ye who believe! fulfil (all) obligations"³⁰⁸ The Prophet (peace and blessings of Allaah be upon him) said: "The Muslims are bound by their conditions"³⁰⁹ also "A Muslim's wealth is forbidden for others to use without his permission."³¹⁰

³⁰⁷ For detail discussion of proponents and opponents

of taking compensation on *taat* see Muhammad al Habib bin al Khowja, "huuq al taleef", *Majala al Fiqh al Islami*, vol.2, No.2, 1986), 288.

³⁰⁸ Al Quran 5:1

³⁰⁹ Narrated by Trimidhi and Abu Dawood.

³¹⁰ Narrated by Ahmad and Muslim, Bakr bin Abdullah Abu Zaid, "Haq al taleef tarekhan wa hukman", *Fiq al Nawazil*, vol 2, (Beirut: Moasasa al Risala, 1996), 180.

4.1.8 It's acquiring *mubah* thing first

Whoever invents a new thing, whether tangible or intangible, possess prior right to it with respect to its production and utilization and seeking profit by moving it out in the market. This is based upon hadith of Holy Prophet (peace and blessings of Allah upon him), which states: "Whoever is the first to acquire a *mubaah* (something lawful to acquire) is entitled to keep it".³¹¹ Copyright is also an exclusive right granted to the author for an "original work". Therefore this original work is protected by the above hadith.³¹²

4.1.9 Transactions are permissible originally

It is stated copyright are permissible because there is no evidence of its prohibition anywhere in the text. Under Islamic law transactions are permissible originally unless there is an evidence for its prohibition. As Islamic legal maxim states: "The norm in regard to things is that of permissibility" (*Al aslu fil ashyaa al Ibahah*) which means permissibility is the original state which prevails unless there is evidence that allows leaving that position. As Allah (swt) says in Surah Baqarah: "It is He Who hath created for you all things that are on earth"³¹³ Also there is *hadith* which states: "whatever God

³¹¹ Narrated by Abu Dawood.

³¹² Bakr bin Abdullah Abu Zaid, "Haq al taleef tarekhan wa hukman", *Fiq al Nawazil*, vol 2, (Beirut: Moasasa al Risala, 1996), 180; Muhammad Taaqi Uthmani, *Bahoos fi qadaya Fiqhia ma'asara*, 2nd ed, (Damascus: Dar al Qalam, 2003), 122.

³¹³ Al Qur'an 2:29

has made *halal* is *halal* and whatever He has rendered as *haram* is *haram*, and all that over which He has remained silent is forgiven”³¹⁴

4.1.10 Taking consideration for *ahadith*

The *Muhaddithun*³¹⁵ gave permission to whoever they want to narrate *hadith* and they also prohibited whoever they consider incapable for it. It is also quoted as some of the *muhadditeen* permitted taking consideration for narrating *hadith*. However large number of *ahl-e-hadith* did not approve of it. Ibne Salah has stated: ‘Whoever takes consideration for narrating *hadith* then his traditions will not be accepted by his nation among scholars of *hadith*’. However Abu Naeem and Ali bin Abdul Aziz have permitted taking consideration for narrating *hadith* and have termed it similar to taking wages for teaching Quran. Abu Sherazee has given *fatwa* on the permissibility of taking wages for narrating *hadith* has given authority by Hadith: *ahaq ma akhastum ilahee ajran kitab Allah*³¹⁶ which means you deserve reward for book of Allah. Therefore taking remuneration for narrating *hadith* though disliked by *ulama* is allowed by some of the *ulama* and is thus similar to taking money on writing.³¹⁷

³¹⁴ Mohammad Hashim Kamali, *Qawa'id al fiqh : The legal maxims of Islamic law* (UK: The association of Muslim lawyers),2 , http://www.sunnah.org/fiqh/usul/Kamali_Qawaaid_al-Fiqh.pdf

³¹⁵ The traditionalists or scholars of hadith.

³¹⁶ Bukhari.

³¹⁷ Muhammad al-Ami'n Mustafa' Abu al-Shanqeetee, *Dira'sah Shar'iyyah li ahkammim al-'Uqu'd al-Maliyyah al-Mustahdathah*, (al-Madi'nah: Matba 'ah al- 'Ulu'm Wa al-Hikmah, 1992), 745,746.

4.1.11 Analogy over benefits arising from insects

Ulama have termed *mal* the benefits arising from some of the animals like worms (like silkworm) and song of bird and its beauty. If the benefits arising from the service of animals, whether it's simple like song of bird and voices of parrots or great like benefit from its carriage and transport and guard dogs, return towards its respective owner then benefits arising from writing should return towards its respective owner in the first instance.³¹⁸

4.1.12 Sadd al-Dhari'ah

An author devotes his life on his work. Also he might not have any other source of income. Thus taking rights away from authors will discourage and prevent authors from writing or creating other intellectual work as they will try to find some other source of income to meet their needs. It will be a huge loss of intellectual work. In the past kings and *khulafa* used to give huge annual prizes grants to authors. They used to respect them and encouraged them towards more research and writing.³¹⁹ This is not the case today. Now writers and creators have to meet their ends themselves. Profit from their intellectual work is their only source of income.

Therefore to prevent creators from finding other sources of income and eventually to prevent intellectual loss copyright laws should be justified under the principle of *Sadd al-Dhara* (blocking the lawful means to an unlawful end). There is Islamic legal maxim

³¹⁸ Ibid., 747-748.

³¹⁹ Ibid., 750.

which states: "Prevention of evil takes priority over the attraction of benefit." (*Dur' al-masaalihi awla min jalb al manaafi*).

4.1.13 Copyrights are *muqara haquq* or an original right (*asalatan*)

Copyright is a type of *muqara haquq* and not *mujarada haquq*. There are two types of rights. First type or *mujarada huquq* is the one that is established by *Shariah* to remove harm like right of *shufa* (pre-emption), and right of *khayar*³²⁰ for women whose *nikah* has been performed before she got married. These rights can neither be established by *mal* nor can be waived by *mal*. It is not allowed to take consideration for this type of right because it is established to remove harm.³²¹

However second type of right or *muqara haqooq* are established originally and from the very beginning for the owner. As for example, legal heirs of murderer have right of *qisas* or retaliation, right of husband to keep *nikah* or marriage contract, right of master on slave, right of wife to have house or portion. It is allowed to abandon these rights by *mal* or monetary compensation.³²²

³²⁰ Option or choice.

³²¹ *Sulh* is also not permissible for rights that are established to remove harm. If the owner of right is ready to withdraw from his right by monetary compensation it means obviously that he has no harm. That's the reason he will not be entitled for it.

³²² Its permissibility is evident from Quranic verses. It is allowed for the heirs of murderer to pardon his right of *qisas* in exchange of property. It is stated by Allah (swt):

- "O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then

Thus, copyright fall into the second category of rights. It is not established to prevent damage but is there originally from the very beginning. For example book is found only by the efforts of author. There is an original right on book that can be extinguished and sold. It is allowed for author to take consideration for it.³²³

grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty".(Al Quran 2 : 178)

- "A divorce is only permissible twice: after that, the parties should either hold Together on equitable terms, or separate with kindness. It is not lawful for you, (Men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by God. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by God; so do not transgress them if any do transgress the limits ordained by God, such persons wrong (Themselves as well as others)".(Al Quran 2:229)

- "Let those who find not the wherewithal for marriage keep themselves chaste until Allah gives them means out of His grace. And if any of your slaves ask for a deed in writing (to enable them to earn their freedom for a certain sum) give them such a deed if ye know any good in them; yea give them something yourselves out of the means which Allah has given to you."(Al Quran 24:33)

³²³ Bakr bin Abdullah Abu Zaid,"Haq al taleef tarekhan wa hukman", *Fiq al Nawazil*, vol 2. (Beirut: Moasasa al Risala, 1996), 177.

4.1.14 Teaching or transmitting knowledge was taken as *fida* in Islamic history

Holy Prophet (May peace and blessings of Allah be upon Him) considered teaching ten Muslim children reading and writing as *fida* or ransom for non-Muslim prisoners.³²⁴ *Fida* or ransom is taken for money or equal number of Muslim captives, which is tangible. Teaching is intangible but still it was accepted as *fida*. This means intangible things can be property or can be owned.

4.1.15 It is '*urf*

Number of Islamic Scholars has justified copyrights on the basis of '*urf*. The most notable among them are the scholars of Indian Sub-continent. Among are Justice Taqi Usmani, Mawlana al-Shaykh Fath Muhammad al-Lakhnawi, 'Allamah Shaykh al-Mufti Muhammad Kifayat Allah, Allamah Shaykh Nizam al-Din, Shaykh Mufti 'Abd al-Rahman al-Lajpuri.³²⁵ Federal Shariat Court has also justified it under custom in their

³²⁴ After the victory of Badr, Holy Prophet (May peace and blessings of Allah be upon Him) released prisoners on condition to teach boys of Medina to write. He employed several Quraish captives to teach boys of Madina and this service counted as Ransom. Each captive was employed with twelve boys and as soon as boys attained their stipulated level of progress their captives were set free. [James Hasting, John A. Selbie, ed. *Encyclopedia of Religion and Ethics*, Part 9 (Kessinger Publishing, 2003),198]

³²⁵ Taqi al 'Uthmani, *Bahoos fi Qadayah Fiqhiyyah al Mu'asarah*, (Damascus: Dar al Qalam, 2003),123.

respective judgment.³²⁶ The core reasoning of above mentioned proponents for justifying copyright copyrights is '*urf*. Whereas there are some other scholars³²⁷ who have justified copyrights on several other reasoning and '*urf* constitute only a secondary reasoning in their justifications.

According to these proponents copyright has become a prevalent custom. In *Shariah* a lot of issues are legalized by custom and traditions. There is Islamic legal maxim which states: "Custom is the basis of judgement" (*Al-'addatu muhakkamatun*). The companion of Holy Prophet (peace and blessings of Allah be upon Him), Abdullah ibn Mas'ud, stated that "what the Muslims deem to be good is good in the eyes of God"

Usage of people is *hujja* or evidence of legality and it is obligatory to act upon it. The Prophet (may peace and blessings of Allah be upon him), said: "Muslims are bound by their stipulations"³²⁸ Also there is an Islamic legal maxim which states: "What is determined by custom is tantamount to a contractual stipulation" (*Al marufu urfan kala-*

³²⁶ PLD 1983 Federal Shariat Court 125.

³²⁷ Fatih al Duraini, Abdul Hameed Tahmaz.

³²⁸ Abu Dawud & Al-Hakim.

*mashruti shartan).*³²⁹ Another maxim states: “A matter established by a custom is like a matter established by legal text.”³³⁰

Lots of issues in Islam are legalized through custom. *Fuqaha* have established rights though custom like right of thoroughfare or walking, vacant space on top of the building known as *haqq-e-ilw*, right to drink water from well. It is allowed to take consideration on these kinds of rights, if anyone wants to withdraw it in exchange of property.³³¹

Custom is of two types; Special and Common. Each of them is either compatible with *Shariah* or they are not. If it is compatible with *Shariah* then there is no difference upon it. However if custom is against *Shariah*, against from all aspects, like following custom makes leaving the text of Quran then this custom will be abandoned and there is no doubt upon it. For example custom of people in forbidden things like usury, drinking wine, wearing gold and others on which there is definite evidence.³³² Therefore in consideration of the 'urf of copyright, there is no opposition to any *shar'i* text of the Quran and Sunnah.

³²⁹ Mohammad Hashim Kamali, *Qawa'id al fiqh : The legal maxims of Islamic law* (UK: The association of Muslim lawyers), 3, http://www.sunnah.org/fiqh/usul/Kamali_Qawaaid_al-Fiqh.pdf

³³⁰ “Learn Islamic legal maxim”,

http://www.zaharuddin.net/index2.php?option=com_content&do_pdf=1&id=113 (accessed February 2010).

³³¹ Abdul Hameed tahmaz, “Haq al-taleef wa tozee wa nashr wa tarjama”, *Haq al ibtikar fi al fiqh al islami al muqaran* , Fathih al Dareni.ed, (Beirut: Moasa al risala, 1987), 177-179.

³³² Ibid., 179.

4.1.16 *Al ghuram bil ghunam/ al kharaj o bi daman*

When creator creates an invention or writer writes a book then he spends his time, energy and money on it, therefore he only has right to get its full value.³³³ He has right to take compensation from those who take benefit from his work. Also writer is answerable for his scripture in both the worlds. He is the one who takes responsibility for any criticism on his work; therefore he should also take credit from his work. This right of his is evident from hadith: "Profit follows responsibility" (*Al-kharaju bid-daman*). This hadith has the status of Islamic legal maxim.³³⁴

4.1.17 *Maslaha*

Copyright are in the interest of society as well as author or creator. The rule of *maslaha mursala* and *istislah* in Islamic law establishes this right. These are the characteristics which are in accordance with conduct and *maqasid* (objectives) of *Shariah*³³⁵ but there is no specific evidence in the *Shariah* for it. Its *hukm* is on the basis

³³³ Muhammad al-Ami'n Mustafa' Abu al-Shanqeetee, *Dira'sah Shar'iyyah li ahkammeh al-'Uqu'd al-Maliyyah al-Mustahdathah*, (al-Madi'nah: Matba 'ah al- 'Ulu'm Wa al-Hikmah, 1992), 749.

³³⁴ Abdul Hameed tahmaz, "Haq al-ta'leef wa tozee wa nashr wa tarjama", *Haq al ibtikar fi al fiqh al islami al mugaran* , Fathih al Dareni.ed, (Beirut: Mu'assat al risalah, 1987) ,184.

³³⁵ Al Ghazali has stated that "objectives consists of protecting five 'essential values' namely religion, life, intellect, lineage and property. Any measure which secures these values falls within the scope of *maslaha* and anything which violates them is *mufsada*"; Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd ed (UK: Islamic Texts Society, 2006), 351.

of bringing *maslaha* (benefit) and warding off evil.³³⁶ Indeed the *ahkam* of *Shariah* have come to establish benefit and to remove harm and everything that is there to 'gain *masalah* (benefit) and remove *mufasid* (evil)' is permissible in the eyes of Allah. There is no doubt that formation of copyrights and its transfer establishes *maslaha* and removing these rights creates *mufasid*.³³⁷

Copyright is in the interest of writer, creator, publisher and others as it is their source of income. Copyright is also in the interest of society as a whole. Copyright encourages writers and creators towards spreading their work. As a result increasing number of intellectual work is created. Therefore interest in general goes towards human society from the fruits of intellectual creations. Intellectual creation is *maslaha*, it is liked by *Shariah* because it is element from the elements of transmitting knowledge and spreading among masses and it is from *maqasid e shariah*.³³⁸

As Imam Ibne Qayam states: "Shariah is based and sourced on interest...it is complete justice, complete blessing, complete interest, and complete reason...Thus *Shariah* provides Allah's justice between people, and blessings among creatures..."

³³⁶ Dr. Wahba Zuhali, "Haq al-ta'leef wa al-nashr wa al-tarjama", *Haq al ibtikar fi al fiqh al islami al muqaran*, Fathih al Dareni.ed, (Beirut: Mu'assat al risalah, 1987), 188.

³³⁷ Muhammad al-Amīn Mustafa' Abu al-Shanqeetee, *Dirāsah Shar 'iyyah li ahkammeh al-'Uqu'd al-Maliyyah al-Mustahdathah*, (al-Madīnah: Matba 'ah al- 'Ulu'm Wa al-Hikmah, 1992), 743.

³³⁸ Ibid., 748.

In the modern world, willpower of people has become weak. If people are not given wages or compensation for their intellectual work then they will leave the field. This will result in great loss and this is greater loss for Islamic literature.³³⁹

4.2 Opponents of copyright for Islamic literature

According to some scholars like Muhammed Ameen al Shanqeete it is preferable for Muslim if he does not have need, to abstain from taking compensation in his writings on matters related to Islam. However if he is in need then he can compensation according to his need.³⁴⁰

Whereas some others like mujlisul ulama of South Africa have prohibited acquiring compensation in Islamic literature. They have quoted the Quranic verse: "The Signs of Allah have they sold for a miserable price, and (many) have they hindered from His way: evil indeed are the deeds they have done."³⁴¹

Opponents state that Copyright interferes with goals of *ilm* (knowledge), mission of *risalat* (prophecy) and blocks the vital avenue of *deen* (religion) which is *dawa* and *tableegh*.³⁴² If there will be copyrights and publication will not be open for every Muslim

³³⁹ Abdul Hameed tahmaz, "Haq al-taleef wa tozee wa nashr wa tarjama", *Haq al ibtikar fi al fiqh al islami al muqaran* , Fathih al Dareni.ed, (Beirut: Mu'assat al risalah, 1987) ,185-186.

³⁴⁰ Bakr bin Abdullah Abu Zaid, "Haq al taleef tarekhan wa hukman", *Fiqh al Nawazil*, 183.

³⁴¹ Al-Qur'an 9:9

³⁴² Mujlisul ulama of South Africa, *The Shariah and Copyrights, Patency rights and Jaahiliyyah rights*, (South Africa: Young Men's Muslims Association, 2005).

<http://books.themajlis.net/node/331> (accessed October 12, 2009).

then it will materialize objective from objectives of *Shariah*, which is prevalence and circulation of Islamic literature and spread of *Shari* knowledge.³⁴³

Opponents have also stated that writing and dissemination of Islamic literature is *ibada* (worship) and *ibada* is not acceptable from human beings unless it is purely for the sake of Allah. If intention is something else along with it or from His creatures-like fame, repute or wealth-then it is major or minor *shirk*.³⁴⁴

Allah says in Surah Az-Zumar: "Say: "Verily, I am commanded to serve Allah with sincere devotion."³⁴⁵

4.3 Opponents of Copyright

There are scholars³⁴⁶ who are of the view copyrights are not allowed at all whether it is Islamic literature or not. Their arguments are:

4.3.1 It is not property

Copyrights are established over non material things that are not property whereas property is established over material things. Or in other words they state that copyright is

³⁴³ Bakr bin Abdullah Abu Zaid, "Haq al taleef tarékh wa hukman", *Fiqh al Nawazil*, 183.

³⁴⁴ Sheikh Muhammad Abu Zahra, *The concept of war in Islam* , quoted in www.islamonline.net

³⁴⁵ Al-Quran 39:11

³⁴⁶ Like : Muhammad Shaafi, Mufti Muhammad Hassan Gangohi, Mufti Rashid Ahmad, Muhammad Yusuf Ludhyaanwi, Dr. Ahmad Hajji al Kardi, Maulana Ashraf Thanawee

right and not *ayn*. It falls under *haqiq al-majarada* and it is not allowed to sell or transfer *majarada* right. It cannot be waived by *mal*.³⁴⁷

4.3.2 Copyright is Infidels law

Copyrights were originated in the West. Islamic civilization could not get it self-exempted from this imitation. Western civilization, philosophy, values and life style has not only made its influence on Muslims way of eating, drinking and living, and other material things but it has also made an impact on their social dealings and foremost of all are financial transactions.³⁴⁸ Allah's love cannot be attained without diverting the focus of heart from financial rewards of *kuffar* capitalist system as it is stated in Quran:

"Strain not thine eyes. (Wistfully) at what We have bestowed on certain classes of them, nor grieve over them: but lower thy wing (in gentleness) to the believers."³⁴⁹

According to Sheikh Saleh bin Abdur Rehman Al Husain, source of copyrights is law not being *Shariah* does not necessarily mean that it is not sanctioned by Islamic law. However history of copyright shows that this law did not come into existence until trade from authors started gaining profit and investment, and after emergence of industrial and commercial revolution in dissemination of literature through theaters, printing presses

³⁴⁷ Bakr bin Abdullah Abu Zaid, "Haq al taleef tarekhan wa hukman", *Fiq al Nawazil*, vol 2, (Beirut: Moasasa al Risala, 1996), 183.

³⁴⁸ Sheikh Saleh bin Abdur Rehman Al Husain, *Hal lil taleef al Shari Haq mali*, <http://www.taiba.org/ta/main/main.php?&mid=51&topicsview=1> (accessed October 14, 2009).

³⁴⁹ Al Quran 15: 88

and publishing houses. Therefore this law is even natural law as known in Western legal system. There is great difference between laws that are created by Islam and this man made law.³⁵⁰ A credible custom has no relation with the custom of infidels, which do not take into consideration rather, abandon *Shariah* and *Sunnah* of Islam.³⁵¹

4.3.3 Copyrights are never required as it is evident from historical evidence

There is not even a single reported incident of dispute between author and publisher prior to copyright laws.³⁵² Ahmad Nadeem states that there has never been an issue of copyright in ancient Islamic civilizations. Despite of the fact there had been constant progress in the field of literature even at that time. Authors then always wanted their work to assimilate widely. They were always eager to get more reward in the hereafter.³⁵³ Ancient *ulama* gained Allah's pleasure. The truth is they gained knowledge only for the sake of Allah and they performed *ibada* through it and refused to get worldly reward

³⁵⁰ Sheikh Saleh bin Abdur Rehman Al Husain, *Hal lil italeef al Shari Haq mali*. <http://www.taiba.org/ta/main/main.php?&mid=51&topicsview=1> (accessed October 14, 2009).

³⁵¹ Mujlisul ulama of South Africa, *The Shariah and Copyrights, Patency rights and Jaahiliyyah rights*, (South Africa: Young Men's Muslims Association, 2005), <http://books.themajlis.net/node/331> (Accessed October 12, 2009).

³⁵² Ibid.

³⁵³ Muhammad al-Ami`n Mustafa` Abu al-Shanqeetee, *Dira'sah Shar'iyyah li ahkammeh al-'Uqu'd al-Maliyyah al-Mustahdathah*, 739.

through it in order to get reward that Allah (swt) has for *ulama*.³⁵⁴ They tried to learn some other small works and professions in order to earn livelihood and to meet their social needs but they did not make knowledge their source of earning and there are abundant instances like that in Islamic history.³⁵⁵

4.3.4 Rights are extinguished by its first sale

When a person sells a book or any other copyrighted material to another, then buyer own that book in its totality, and it is permissible for buyer to use it as he wishes, thus it is permissible for him to publish it and it is not allowed for seller to prevent him from doing so.³⁵⁶

³⁵⁴ Following evidence is quoted in support of their argument: Allah (swt) has stated in Surah No. 58 (Mujadala), Verse No. 11: "Allah will rise up, to (suitable) ranks (and degrees), those of you who believe and who have been granted (mystic) Knowledge. And Allah is well- acquainted with all ye do" also Holy Prophet (may peace and blessings of Allah be upon Him) stated : "He is not one of us who do not respect our elders and shows no mercy to younger ones does not acknowledge the right due to *ulama*" [Dr. Ahmad al Hajji al Kardee, "Hukam al Islam fi haqooq al taleef wa nashar wa tuzee wa tarjama", *Hadee al Islam*, (Oman: al mumlakatee al urdania al hashmia, 659), 13]

³⁵⁵ Dr. Ahmad al Hajji al Kardee, "Hukam al Islam fi haqooq al taleef wa nashar wa tuzee wa tarjama", *Hadee al Islam*, (Oman: al mumlakatee al urdania al hashmia, 659), 13.

³⁵⁶ Muhammad Taqi Uthmani, *Bahoos fi qadaya fighia m.a.sara*, (Damascus: Dar al Qalam, 2003), 124.

4.3.5 Infringement of copyrights does not result in loss

Infringement of copyright does not result in loss for author. Nevertheless it results in decrease in profit, which is different from loss. If a permissible activity results in decrease in profit of another then it nevertheless remains permissible.³⁵⁷

4.3.6 Copyright restricts dissemination of knowledge

Copyright restricts spread of publications and knowledge. If everyone gets right of publications and distribution, then knowledge will spread widely and more people could benefit.³⁵⁸

4.3.7 Copyright results in monopoly

Copyright restricts competition. It gives free hand to author to demand high price which cannot be done in case of competition by others. There is hadith of Abdullah Ibn Abbas (ra) in Bukhari and Muslim in which Holy Prophet (peace and blessings of Allah be upon him) prohibited buying grains (goods) from trade caravans before reaching the city. In this hadith Holy Prophet prohibited people of towns (merchants and agents) from going to outskirts and intercepting and buying goods from farmers (who are unaware of market price). They should be allowed to sell directly to the public at city. In this way monopolistic practice could be avoided and masses could get goods at cheap rates. This

³⁵⁷Mujlisul ulama of South Africa, *The Shariah and Copyrights, Patency rights and Jaahiliyyah rights*, (South Africa: Young Men's Muslims Association, 2005), <http://books.themajlis.net/node/331> (Accessed October 12, 2009).

³⁵⁸ *ibid*

shows that *Shariah* avoids acts which causes discomfort to the masses in large. The monopoly of authors by copyrights has in fact caused harm to masses in general. Therefore copyright should be prohibited all the more because *Shariah* does not allow benefit of an individual at the cost of masses.³⁵⁹

4.3.8 *Adamut taqleed*

Those who strictly adhere to *taqleed* have rejected copyright for it is against *taqleed*.³⁶⁰

4.4 Analysis of the Arguments of Proponents

There are several loopholes in the arguments of proponents that need to be analyzed. Most of the proponents in their arguments have tried to justify the sale of rights. They have only tried to justify that it is possible to sell rights. Many evidences has been narrated to prove the point like hadith of accepting memorization of part of Quran as *mahr*, *hadith* of taking money while doing treatment with the help of Quran, acceptance of taking remuneration of narrating *hadith*, teaching Quran, and others. However none of evidence states or suggests forbidding other from taking benefit from the same right or thing, or in other words none of the evidence suggest it as an exclusive right. Copyright is

³⁵⁹ ibid

³⁶⁰ ibid

not just your right to sell but it "the legal right to control the production and selling of a book, play, film, photograph or piece of music."³⁶¹

The most common argument among Islamic scholars who are proponents of copyright is that it is customary practice. No doubt custom has constituted a very important source of law. However among the conditions of custom to have the force of law is that it should be commonly prevalent that is it should be consistently followed upon.³⁶²

Therefore the question arises if it is really commonly prevalent. The ground realities show that it is otherwise. Copyright infringement is prevalent all over the world. As facts shows: "Global software piracy is 43% which means that for every \$100 worth of legitimate software sold in 2009, an additional \$75 worth of unlicensed software also made its way into the market."³⁶³ Moreover Pakistan is called a global hub of audio and video piracy.³⁶⁴ It has been stated that piracy of all major famous brands and products is

³⁶¹ Cambridge Dictionaries Online, "Cambridge Advanced Learner's Dictionary", Cambridge University Press, <http://dictionary.cambridge.org/define.asp?key=17095&dict=CALD> (accessed May 15, 2009).

³⁶² Ibne Najaym, *Al Ashba wa nazair ala madhab Ibe Haneefa al Nauman*, vol.1, (Beirut: Dar al Kutab al Ilmia, 1999), 81; Jalalu din al Sayuty, *al ashba wa nazair*, (Bierut: Dar al Kutab al Ilmia, 1990), 92.

³⁶³ BSA Online " BSA Reports \$51 Billion Worth of Software Theft in 2009", *United States: News & Events*, <http://www.bsa.org/country/News%20and%20Events/News%20Archives/global/05112010-globalpiracystudy.aspx> (accessed February 23, 2011).

³⁶⁴ Aamer Ahmed Khan, "Pakistan-copyright piracy hub", *BBC News*, May 3, 2005. http://news.bbc.co.uk/2/hi/south_asia/4495679.stm

rampant in Pakistan.³⁶⁵ Also book piracy is rampant and has spread beyond bazaars. All types of books are pirated.³⁶⁶ Pakistan is rated by Business Software Alliance and international research firm IDC³⁶⁷ as one of the worst offenders in software piracy. The research puts piracy rate in Pakistan at eighty-four percentage.³⁶⁸ It is also ranked among the world's top pirate nations by international piracy watch dogs and is placed in 'priority watch list' in USTR's 2010 Special 301 Report.³⁶⁹

These statistics show that people in Pakistan are not accustomed to copyrights. Vast majority of people prefer buying cheap pirated version then the original one. In fact people don't know that these laws really exist. As it was stated by Miss Nadia Zubair Shah, Deputy Director Intellectual Property Rights, that 90 percent of people in Pakistan do not know about intellectual property rights. She was of the view that even judges in

³⁶⁵ "Intellectual Property Rights Enforcement, A Pre-requisite to Healthy Society and Strong Economy" Intellectual Property Rights in Pakistan, Advertisement Supplement, *DAWN Islamabad*, Monday, July 7, 2008.

³⁶⁶ International Intellectual Property Alliance, "International Intellectual Property Alliance (IIPA)-2010 Special 301 Report on Copyright Protection and Enforcement", www.iipa.com/rbc/2010/2010SPEC301PAKISTAN.pdf (accessed March 2011)

³⁶⁷ International Data Corporation.

³⁶⁸ Business Software Alliance, "Seventh Annual BSA/IDC Global Software-09 Piracy Study-May 2010", http://portal.bsa.org/globalpiracy2009/studies/09%20Piracy_In%20Brief_A4_111010.pdf (accessed March, 2011)

³⁶⁹ International Intellectual Property Alliance, "IIPA Press Release on USTR's 2010 Special 301 Report April 30, 2010", www.iipa.com/.../IIPASpecial3012010PressReleaseonUSTRReport043010.pdf (accessed March 2011)

Pakistan are not aware of Intellectual Property Rights and their training is in progress.³⁷⁰ Therefore question arises where is the custom that has justified copyright according to number of Islamic scholars.

After analyzing that custom is not enough for justification of copyright laws. Need arises to justify copyrights under more credible source. *Masalaha Mursala* is one such doctrine.

Literally *maslaha* is defined by al Ghazali as "the acquisition of *manfa'ah* (benefit) or the repulsion of *madarrah* (injury / harm)."³⁷¹ Technically; it means maintaining the purposes of Islamic law in the dealing of legal issue. Purposes of Islamic law are the interests recognized by *Shari'ah*. Shanqeete has validated copyright on several bases and among them is *maslaha*. He has stated that copyright is in the interest of copyright holders as it is their source of income, this encourages them towards intellectual creation and resultantly the whole human society reaps benefit from it.³⁷² Now question arises if giving copyright to creators the only incentive for creators towards intellectual creation or there is any other incentive? Earlier rulers used to give grants to creators. Can this method be introduced again? Moreover there is also growing concern that intellectual right are created by the nations whose interest lays in these rights. Copyrights and other intellectual rights are not really in the interest of developing countries but are actually in

³⁷⁰ Nadia Zubair, conversation with author, 16th July, 2008.

³⁷¹ Imran Nyazee, *Outlines of Islamic Jurisprudence*, 156, 165, see also Al Ghazali, 'Al Mustafa min 'ilm al-usul.

³⁷² Muhammad al-Ami`n Mustafa` Abu al-Shanqeetee, *Dira`sah_ Shar 'iyyah li ahkammeh al_ 'Uqu`d al-Maliyyah al_Mustahdathah*, 743, 748, 750.

the interest of developed countries. All these concerns need to be addressed while justifying copyright under public interest.

CHAPTER 5

EFFECTS OF COPYRIGHT

Copyrights are justified by number of scholars. However there are very few scholars who have gone into the depth of the issue while justifying these rights. Very few scholars have discussed the nature of contract of publisher, distributors and translators under sharia. Also after terming copyrights as property there are very few scholars who have discussed distinct rulings of these rights as compared to the rulings of property in general.

5.1 Right of Publication & Distribution

Dr. Wahba al Zuhayli has stated its *hukm* is upon agreement between author and publisher and distributor. It is obligatory upon both sides to act upon their agreement on number of copies to be published and upon the duration agreed upon. Allah (swt) has ordained keeping agreements and contracts. It is stated in Surah Maida:

"O ye who believe! fulfil (all) obligations"³⁷³

And in Surah Al-Isra'

"And fulfil (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning)"³⁷⁴.

³⁷³ Al Qur'an 5:1

³⁷⁴ Al Qur'an 17: 34

Therefore on this basis it is *haram* in *Shariah* to break covenant and it is not permissible for author to give the right of publication to somebody else during the term of contract. Zuhayli has also stated it is not correct to state that publishers and distributors have contributed in the fame of author therefore they are entitled to remuneration and percentage of profit.³⁷⁵ Abdul Hammed Tahmaz has stated that in order to avoid disputes it is suitable that the contract should be clear that will be binding on both the parties. Amount of money that publisher will give to author should be clear. Also number of copies to be published and time required for publication and distribution.³⁷⁶

5.1.1 Nature of contract or relationship between author and publisher

There is difference of opinion regarding contract between author and publisher. According to one view the contract between them is that of *wakala* (agency) and the publisher is *wakeel* (agent) of the author.³⁷⁷

If it is contract of *wakala* then it is not permissible for *wakeel* to transfer his right of *wakala* to other on remuneration. Thus right received by permissibility of publication or

³⁷⁵ Dr. Wahba Zuhali, "Haq al-ta'leef wa al-nashr wa al-tarjama", *Haq al ibtikar fi al fiqh al islami al muqaran*, Fathih al Dareni.ed, (Beirut: Mu'assat al risalah, 1987), 188-191.

³⁷⁶ Abdul al-Hammed Tahmaz, "haq al-ta'leef wa al-tauzee wa al-nashr wa al-tarjama", *Haq al ibtikar fi al fiqh al islami al muqaran*, Fathih al Dareni.ed, (Beirut: Mu'assat al risalah, 1987), 181.

³⁷⁷ Muhammad al-Ami'n Mustafa' Abu al-Shanqeetee, *Dira'sah Shar 'iyyah li ahkammeh al_ 'Uqu'd al-Maliyyah al_Mustahdathah*, (al-Madi'nah: Matba 'ah al- 'Ulu'm Wa al-Hikmah, 1992), 754.

the permission itself is not *mutaqarar* right therefore it is not allowed to abandon it and its evidence is as under:

1. Hadith of Holy Prophet (May peace and blessings of Allah be upon Him) forbade transfer of food grains before taking its full possession.

Abu Huraira (Allah be please with him) is reported to have said to Marwan: Have you made lawful the transactions involving interest? Thereupon Marwan said: I have not done that. Thereupon Abu Huraira (may peace be upon him) said: You have made lawful the transactions with the help of documents only³⁷⁸, whereas Allah's Messenger (may peace be upon him) forbade the transaction of food grains until full possession is taken of them. Marwan then addressed the people and forbade them to enter into such transactions (as are done with the help of documents). Sulaiman said: I saw the sentinels snatching (these documents) from the people.³⁷⁹

2. It is not allowed for any publisher to sell permission of publication he has, because copyright in book is *mutaqawim* or has value but specific permission of publication is not *mutaqawim* or do not have value, as for example it is not allowed to sell right of inheritance. If publisher sell the right of publication then it will be considered as he has sold

³⁷⁸ Nawai has stated while explaining the hadith that documents were released by the ruler for *rizq* to the deserving, in it was written food or other things for this and this person. Therefore the holder sold the document without getting the possession (of thing).

³⁷⁹ Sahih Muslim, Book 10: Transactions (Kitab Al-Buyu'), Number 3652,
http://www.iium.edu.my/deed/hadith/muslim/010_smt.html

something that he did not have and rulings of sale of *fuduli* (unauthorized person) will be applied upon it.

3. When a publisher sell right of publication to another publisher then first publisher takes this money against the money that he had paid to writer. It will come under *riba* or will be similar to it. As is narrated by Ibn e Abbas: "The Prophet (May peace and blessings of Allah be upon Him) forbade the selling of foodstuff before receiving it. I consider that all types of selling should be done similarly."³⁸⁰

4. Contract between two publishers is based on *gharar* or uncertainty. This is because return of book is not known nor it is certain because it has element of *gharar*.³⁸¹

According to another view the contract between them is the contract of *ijara* (hiring). The relation of publisher with author will be as that of *mustajir* or tenant with *mo'ajir* or landlord as two situations are similar. In the contract of *ijara* known *nafa'* or usufruct is sold for known monetary compensation, *manfa'h* is known by terming the interval of *ijara* as for example in the case of house. Similarly it is possible in the contract of publication that *manfa'h* is known by terming the number of copies to be published and time period required for publication of books. As it is not permissible for *mo'ajir* or lessor to give the house he has given for rent to another tenant during the time period of tenancy

³⁸⁰ Sahih Bukhari, Volume 3, Book 34, Number 345,

<http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/034.sbt.html>

³⁸¹ Muhammad al-Ami`n Mustafa` Abu al-Shanqeetee, *Dira`sah Shar'iyyah li ahkammee al-'Uqu'd al-Maliyyah al-Mustahdathah*, 754-756.

or *ijara*. Similarly it is not permissible for author to give the right of publication to another during the time agreed upon except if publisher waives from his right.³⁸²

Dr. Ahmad al Hiji al Kurdi, an opponent of copyright, has also explained the relationship between author and publisher by specifying four situations for author and then has explained each situation legally. The situations are:

- 1) Author gives the book to some publisher after complete writing it. He either gives all the rights (printing, publication, distribution) at once or one by one in settled terms according to his wishes.
- 2) Before start writing the book author makes contract with publisher about its publication and distributions. He prepares the book according to the needs and conditions of publisher.
- 3) Author prepares the book and makes its publication on his own expenses (he himself be the publisher) and then he presents the book to distributor for its distribution or sale.
- 4) Author prepares or writes the book, publishes and distributes it, and keeps it on his special expenses.

The implications of these situations are as follows:

³⁸² Abdul al-Hammed Tahmaz, "haq al-ta'leef wa al-tauzee wa al-nashr wa al-tarjama", *Haq al ibtikar fi al fiqh al islami al mugaran*, Fathih al Dareni.ed, (Beirut: Mu'assat al risalah, 1987), 181 ; Muhammad al-Ami`n Mustafa` Abu al-Shanqeetee, *Dira`sah_ Shar 'iyyah li ahkammeh al_ 'Uqu`d al-Maliyyah al_Mustahdathah*,756.

1. In the first case author is the seller of book. Thus all *ahkamat*³⁸³ that are applicable to seller of any other thing are applicable to writer. He can sell the book on price of his choice. This is because it is *mal* with respect to what it has of paper or skin and ink or material. It has same characteristics as any other object. Publisher can offer the price of his choice. When they make an agreement on specified price and after conclusion of offer and acceptance contract is formed between them on conditions agreed upon, and it becomes obligatory upon both of them. The book will be the ownership of publisher after the conclusion of contract and the writer won't have anything after that but the price agreed upon on the contract. If author makes a condition that he has another right of publishing (or demand price of the next edition) then this condition would be *fasid* (void) and will make the contract of sale *fasid*.³⁸⁴
2. In the second situation author is *ajeer* (employee) and publisher is *mustajir* (employer). In this case normal rules of *ajeer* and *mustajir* will apply. It is

³⁸³ p. of *hukm*, rulings of *Shari`ah* and its conjunctions

³⁸⁴ Dr. Ahmad al Hiji al Kurdee, "Hukam al Islam fi haqooq al taleef wa nashar wa tuzee wa tarjama", *Hudal Islam*, (Aman: al mumlakatee al urdania al hashmia, 1979), 14, Dr Ahmad Hiji states that this condition is also *fasid* according to Ahnaf. This is because the condition is against the intentions of contract. The intention of contract is to establish ownership of book for publisher and that he should have complete authority over it. This condition stops publisher (buyer) from it, that's why this condition is incorrect. There is benefit of author (seller) in this condition, that's why it will make the sale *fasid* as it can lead towards dispute. If contract is formed with this condition then ownership of publisher over book is *haram*.

permissible for author to ask specific wages on his scripture as it is allowed for employer to present less. When both of them agree then contract becomes *lazim* or binding. Whatever author gives is the ownership of publisher and for author is wages for whatever is agreed upon. If author again makes condition for publication then this condition will be *fasid* and will make the *ijara fasid*. Its conditions will be same as explained in the first situation and it is important to describe the characteristics of book to make *ijara* valid. This is to remove *jahala* or ambiguity. Subject, structure and way of writing are to be explained as it is important to specify wages. It is also not valid to give wages from profit on the basis of percentage as it is done by most of the publishers and authors because by not determining profit and wages makes the *ijara fasid*. If contract is enforced on wages despite of *jahala* then author will be entitled to similar wages and not fixed wages.

- When author has published the book on his own expenses but specified publisher for publication then publisher will be *ajeer* and author will be *mustajir*. And for *ijara* to be valid, the work of *mustajir* needs to be specified. Specification of the wages is also important and wages should not be from the percentage of profit (of the books sold).³⁸⁵

³⁸⁵ Ibid. In support of this author relies on the opinion of Imam Malik that if a person gives someone his property to sell and tells that he will get commission on each dinar, that is not correct, because any reduction in price of property would reduce his right or commission and this will amount to *gharar* (risky or ambiguous sale) because he is not in position to know as to what would be his wages.

4. When author has published and distributed the book himself without putting any one on wages. Then a person came and bought the book and published it again on his own expenses without the knowledge of author.³⁸⁶ According to Dr. Hajji publisher of the book is his owner. He will be considered as his buyer in the interest of every person who buys a scripture from him and that's why he can sell it at whatever price he wants. If he publishes it again then he will not be transgressor and first publisher will not have any right upon it. Author has mere right (*haqq-i- majarad*) and according to Dr. Ahmad it is not permissible to sell it.³⁸⁷

5.1.2 Right of Distribution

Abdul Hameed Tahmaz has stated that after publication published copies are at the ownership of publisher because he has spent his money, efforts and energy on publication. Therefore distribution of book and its sale is the responsibility of publisher. He can make agreement with distributor companies for distribution according to his wishes. It is upon him, he can either do contract of hire or rent. Publisher hires distributor for distribution of book on specific wages. He can also make an agreement on contract of sale. Distributor buys from publisher copies of the book then he became responsible for its sale and distribution as he is the owner. In this way there remains no longer remains

³⁸⁶ Ibid.

³⁸⁷ Dr. Ahmad al Hajji al Kardee, "Hukam al Islam fi haqooq al taleef wa nashar wa tuzee wa tarjama", *Hadee al Islam*, (Oman: al mumlikatee al urdania al hashmia, 659), 16.

any relation of author with the distribution of book and its sale. This matter is now between publisher and distributor.³⁸⁸

5.1.3 Right of Translation

According to Abdul Hameed Tahmaz even after translation the attribution of book remains towards author and he remains liable for it. This is because words of book do not change but only language changes. Therefore it is not reasonable for translator to translate anything without the permission of author. Also it is right of author to give permission of translation or not to give. Author can also ask for monetary compensation.³⁸⁹

Dr. Ahmad al Hajji al Kardee has stated that right of translation is like right of authorship. All rules that are applied on author are applied on translator. However, it is important for translator to work hard and efficiently while doing translation service and without changing anything when he is capable of doing it. If he changes the meaning intentionally then he will be transgressor and dishonest. In this scenario executive has right of *tazir* and author cannot escape the *tazir* punishment if he present false information in front of people or if he writes on topic about which he is ignorant. Also it is not allowed for any person to translate work without taking permission from its author and author has no right over translator but translator deserves respect on his work because

³⁸⁸ Abdul Hameed Tahmaz, "Haq al-taleef wa tozee wa nashr wa tarjama", *Haq al ibtikar fi al figh al islami al muqaran*, Fathih al Dareni.ed, (Beirut: Moasa al risala, 1987), 182.

³⁸⁹ Ibid.

he spreads knowledge as Holy Prophet (May peace and blessings of Allah be upon you) said 'May Allah flourish the person who listened to my words and then spread it as he had listened ...'³⁹⁰

5.1.4 Punishment for infringement of copyrighted goods

Theft of books was known and has been discussed in the historical past, in fact books were published on which news of accusations of the theft of books and its defense was mentioned. Imam Sayoti had mentioned this theft. He had compiled a book which is named as "*al bariq wa qata yameen al sariq*". He has stated thieves of knowledge are of three types: First are the thieves of Hadith: they are its transgressor by the *ijma* of *ahl-e-hadith*. Second are the thieves of scriptures. Sayoti has cited what was mentioned by Imam Ibne Hajar in his writing that whoever takes other's compilation for reading and allege it as his own by expanding it little bit or reducing it-as is account of Muhaazab din al Khamee with Najam ud din bin Israel, who stole the poem and went to Sheikh Umar bin al Farid for ruling, thus Ali Najam ud din bin Israel was ruled of stealing.³⁹¹

There is rule that theft is *haram* or forbidden in all its aspects. *Fuquha* have given their opinion on theft of books. They have stated explicitly that theft of books gets the

³⁹⁰ Dr. Ahmad al Hajji al Kardee, "Hukam al Islam fi haqooq al taleef wa nashar wa tuzee wa tarjama", *Hadee al Islam*, (Oman: al mumlakatee al urdania al hashmia, 659), 16-17.

³⁹¹ "Masail fil fiqh, 267-Haq al taleef wa mada shamola li qawaaid al biyanat wa ma fi hukumiha ala shibka (internet)" *Majala al bahoos al sifhia al masara*, Vol. 63, (Riyadh: Al- sharika al-Saudia lil-tauzee, June, July, August, 2004), 293-294.

ruling of theft of property this is because of its characteristic of movable property which is possible to keep safe and transfer and possess. From school of Imam Abu Haneefa, Imam Abu Yusuf is of the opinion that it is obligatory to have ruling of theft on theft of Holy Quran or any text of *Hadith* or Arabic literature or poetry if the value of stolen property reaches the *nisab* of theft. Its evidence is that people used to hoard books and other texts and they used to consider them as precious *mal*. Imam Abu Yusuf differs from Imam Abu Haneefa on it. He does not consider this punishment on theft of Holy Quran or any texts of *hadith* or science or poetry and its evidence is Holy Quran cannot be hoarded but is for recitation.

According to Imam Malik whoever steals books or texts will get the ruling of theft because it is owned property and it is permissible to sell it. However, according to Imam Shafi this ruling is obligatory on every *mal* which is not *haram* or unlawful and books are considered as *mal*. If there is a book on which it is *haram* to take benefit then its pages or material substance will be valued and if it reaches *nisab* or Quorum then ruling of theft will be obligatory upon it.

There are two opinions in the religion of Imam Ahmad. According to one view it is obligatory to have ruling of theft on Holy Quran. This is the apparent statement of Imam Ahmad, when he was asked about his views on person who has stolen he replied everything that has value of three dirham or more gets the ruling of cutting of hands because verse of theft is general. However the second view is that punishment is not obligatory upon it.³⁹²

³⁹² Ibid., 294-295.

Well there is concept of theft of books. However still there is ambiguity as if stealing of a single copy can be analogized with copyright infringement? As there was no concept of printing at that time. What about the person who plagiarize, and make several copies of a book and get economic benefit from it? Can it still be analogized with then theft of book? According to Allamah al-Kasani, "The ingredient of theft is to take away the property of someone surreptitiously.³⁹³ Taking away property of another person publicly is not called theft. Violation of copyright is committed publicly, as plagiarized material is available to the public at large, therefore according to Allamah Kasani will not be called theft.

Sheikh Baaz has stated that transgression of copyright or intellectual property is similar to stealing, as stealing is defined in the *Shariah* as taking 'takings that are valued as quarter of dinar or more'.³⁹⁴ Imam Ibne Qayum while talking about prohibition of tricks or *hala* stated: There are many kinds of thieves, some steal by hands, some by pen and some steal *amana*.³⁹⁵ Therefore according to them transgression of copyright is treated as theft. The *hadd* or maximum punishment for theft in Islam is cutting off hands.

³⁹³ Al Kasani, *Bada'i ' al-Sana'i'* , vol 7, p.65 quoted in: Anwarullah, *The Criminal Law of Islam*, (Islamabad: Shariah Academy, International Islamic University, 2005),179-181.

³⁹⁴Sheykh Muhammad Baazmool, *Sheykh Muhammad Baazmool on Copyrights on Translations and Research, Other Matters Related to Intellectual Property Rights in Islam*, <http://www.bakkah.net/interactive/q&a/aamb080-copyrights-translations-intellectual-property.htm> (accessed March 21, 2011).

³⁹⁵ "Masail fil fiqh, 267-Haq al taleef wa mada shamola li qawaiid al biyanat wa ma fi hukumiha ala shibka" *Majala al bahoos al fiqhia al masara*, Vol 63, (Riyadh: Al- sharika al-Saudia lil-tauzee, June, July, August, 2004), 296.

For punishment to be awarded one must be competent adult. Stolen item must reach . reaches *nisab* or minimum amount and property should be taken from *hirz*, or safe keeping place. However, maximum punishment for infringement of copyright is clearly not cutting off hands.³⁹⁶ Should punishment of cutting off hands be applied to the copyright infringer as well? If not then what is the reason behind? Is it because there is no *hirz* for it, or the infringement is not done surreptitiously? Well I have not gone through any contemporary scholar of Islam discussing the issue.

5.1.5 Are these rights inheritable?

Writer always remains responsible towards his book. He can always make alterations in his work and this responsibility of his remains throughout his life. However the question remains if is this right of his transferred towards his legal heirs after his death? Scholars have differed upon it as they have differed upon sale of rights. Abdul Hammed Tahmaz has stated that roots of the issue go back to the basic difference on sale of rights. According to Ahnaf *majarada haqooq* are personal characteristic of successor and it has no link with material thing, therefore are not inheritable. However according to Shafis and Malikis there is right of inheritance in *majarada haqooq*. Difference on the issue of

³⁹⁶ See details on 2.4.2 , page 48-51 of the thesis

inheritance on rights indicates difference on the issue of inheritance on optional condition (*khayar shart*) on the contract of sale and inheritance on right of *Shufa*.³⁹⁷

It is stated in *Hidayat* that when a person who has *Khyar e Shart* or optional condition dies then his option become *batil* or invalid and is therefore not transferred towards legal heirs. However according to Imam Shafi it is inherited because this right is established on sale and is therefore inheritable. Imam Malik has also stated in his books that there is right of inheritance.

Evidence of Ahnaf is that option is nothing but choice and intention, which cannot be imagined to be transferred because it is personal characteristic and inheritance is possible on something that can be transferred. Therefore evidence of transfer of rights is absent and absence of Sharia evidence is enough to negate Sharia *hukm* or ruling. Allama Zalee states on the topic of inheritance of right of *Shufa* or pre-emption that *Shufa* becomes *batil* with the death of *Shafi* before possession, and inheritance do not apply on it. According to Imam Shafi it does not become *batil* because it is respected right like *Qisas* or retaliation and right of return on defect. Therefore according to Shafis and Malikis inheritance applies on all the rights, among them is copyright.³⁹⁸

Imam Qarafi has stated in 'ijtihadat'-something that results from intellectual thought or intellect, is right of author but right is non-monetary that is not related to *mal* or property, and respectively cannot be inherited. If inheritor does not inherit *asal* original

³⁹⁷ Abdul Hameed ahmaz, "Haq al taleef wa tuzee wa nashr wa tarjama" Fatih al Durini.ed, *Haq al ibtikar al fiqh al Islami al muqaran*, (Beirut: Mosua al Risala, 1986), 183.

³⁹⁸ Ibid., 184-185.

that is an intellect therefore it does not inherit its *far'* / branch or offshoot, which is an invention or intellectual creation. Also inventions of religious things, or related to religion are not inheritable.

There is hadith of Holy Prophet (May peace and blessings of Allah be upon Him) which states: "If somebody dies (among the Muslims) leaving some right (property), (the property) will go to his heirs"³⁹⁹ According to Imam Qarafi this hadith is not general but is related to rights that are transferable to successors. There are rights that are not transferable and whatever is related to successor himself and his intellect or mind is not inheritable. However there is no doubt whatever is related to his *mal* or property is inheritable.⁴⁰⁰

The above discussion shows rights, including copyrights, are inheritable according to majority of *fujahah*. However according to them there is no restriction on the inheritance of these rights that is they remain with legal heirs for as much time as they want. Whereas under modern laws copyrights exist only for a certain time period as in Pakistan they exist only for fifty years after the death of author or creator. This issue has not been discussed by great majority of modern scholars while justifying copyrights. There is a view that copyrights under *Shariah* are perpetual that is they remain with legal heirs after the death of author for unlimited period of time.⁴⁰¹ The provision of limited ownership

³⁹⁹ Narrated Abu Huraira, *Sahih Bukahari*, Vol 8, Book 80 (laws of inheritance), Number 755, http://www.islam4you.info/contents/Hadith/Sahih_Bukhari/80_-_Laws_Of_Inheritance_-_Al-Paraaid.php

⁴⁰⁰ *Fathih al Dareni*, *Haq al ibtikar fi al figh al islami al muqaran*, Fathih, (Beirut: Mu'assat al risalah, 1987), 57-59.

⁴⁰¹ Dr. Abdullah Rizq, class lecture

has been justified under the doctrine of *maslaha* or public interest.⁴⁰² It is stated that when time span of fifty years or more passes after the death of author or creator then generally authors stop taking any economic benefit from the creation, they generally don't bother dissimilating it to the public by not making any reprints or so. Therefore it is in greater public interest to enter the intellectual work into public domain.

5.1.6 Is Zakah deducted from copyrighted goods?

Zakah can only be deducted from Copyright goods if copyright is considered as *mal* or property because Zakah is deduced from *mal*. As it is stated in Quran: "And in their wealth and possessions (was remembered) the right of the (needy,) him who asked, and him who (for some reason) was prevented (from asking)".⁴⁰³ And the saying of the Prophet (May peace and blessings of Allah be upon Him) "Pay the Zakah on your wealth".

In order for *mal* to be deducted for Zakah it has to fulfill certain conditions. These are having undivided and absolute right of ownership over property, growth, prescribed limit of wealth or *nisab*, absence of debts and similar liabilities, and wealth should be more than ones basic needs, and completion of a complete year.⁴⁰⁴

⁴⁰² Muhammad Motiaur Rahman , Research Advisor at Federal Shariat Court, conversation to the author (July 18, 2009).

⁴⁰³ Al Qur'an 51:19.

⁴⁰⁴ Dr. Yusuf al Qardawi, *Fiqh al zakah*, vol.1, trans., Dr. Monzer Kahf (Jeddah: Scientific Publishing Centre King Abdulaziz University), 54-71.

According to one opinion copyright do not fulfill the condition of *nima* or growth therefore *Zakah* is not obligatory upon it except on sale.⁴⁰⁵ An important condition for *Zakatability* is that wealth must be actually growing or have the potential for growth. Real or actual growth is brought by propagating offspring or by increase effectuated by business. As growth in livestock is by producing offspring, also one gets milk, ghee and butter from them. This increase is natural. Potential growth implies the liability of assets to increase when used properly, such as money, gold or silver increases when used in business *Zakah* is not obligatory on goods that do not grow as residential house and industrial goods.⁴⁰⁶ Nevertheless, *Zakah* is obligatory upon its price⁴⁰⁷ immediately or after completion of one year. There is no condition of completion of year because it is like *mal mustafad*⁴⁰⁸ or accrued assets. Some of the accrued goods such as crops, fruits, honey, found treasure and extracted material are *Zakatable* once they are acquired if they reach the amount of *nisab*.

Thus copyrighted material in reality is not intended for growth except when merchant or businessman trades through it. Then all the rules of business assets for deducting *Zakah* will apply upon it.

⁴⁰⁵ Dr.Ali Mohiyudin Ali al Qardaghi, *Bahoos fi fiqh al mamulat al mali al masara*, (Beirut: Dar al bashr al islamia, 2001), 439.

⁴⁰⁶ Ibid., 429.

⁴⁰⁷ When it is sold and its price reaches *nisab* (minimum amount liable to *Zakah*)

⁴⁰⁸ It is property which came into a person's possession during the assessment year but was not into his possession earlier, as for example pay, bonus, etc ;<http://www.islamic-world.net/economics/word/m.htm>

When Ash-Shaykh Ibn Baz was asked how does the owner of a printing company pay *Az-Zakah* he replied

Az-Zakah is only obligatory on owners of printing companies, factories and their likes, for the things that they keep for sale. In reference to the things that they keep for use, there is no *Zakah* on them. The case is same for cars, furniture and tools that are kept for use. There is no *Zakah* on these things. This is due to what Abu Dawud recorded in his Sunan with a good chain of narration from Samurah bin Jundub (*Radhi Allah Anhu*, may Allah be pleased) that he said: "The Messenger of Allah (Salallahu 'alayhi wa salam, may peace and blessings of Allah be upon Him) commanded us to give charity for whatever we kept for sale." Contrary to money, such as gold, silver and cash currencies, *Az-Zakah* is obligatory on all of it, even it is kept for spending, if it reaches the minimum amount required for *Az-Zakah* and it has been kept for a year.⁴⁰⁹

⁴⁰⁹ Shaykh 'Abdul-'Aziz bin 'Abdullah bin Baz, Shaykh Muhammad bin Salih Al-'Uthaimin and Shaykh 'Abdullah bin 'Abdur-Rahman Al-Jibreen. *Fataawaa Islamiyah- Islamic Verdicts*. Vol 3. Muhammad bin 'Abdul-'Aziz Al-Musnad, ed, (Riyadh: Darussalam, 2002).

CONCLUSION

Plagiarism has always been abhorred in the earlier civilizations. With the advent of printing some privileges and regulations were passed by Monarchies in their desire to grasp complete control over the growing industry of printing in their respective kingdoms. However in actual sense the concept of copyrights first came into existence with coming in to force Statue of Anne in 1710, which gave the exclusive right to authors to print, reprint, sell and publish their original work for limited period of fourteen years. Thus gradually the concept of copyright was adopted by other states. Initially the protection was given to authors within the boundaries of their countries. Later on bilateral treaties were also formed but the first international treaty was signed late in 1886. Developing countries then, like USA, refused to join international treaties as they considered them not in their national interest. However they joined international Conventions when they found the time appropriate for them.

As there was no concept of copyright prior to seventeenth century so obviously it has not been discussed by *fujaha*. Though like other civilizations plagiarism had been abhorred. The concept of sale of right and terming rights and *manafa* as *mal* or not and making them subject of sale has been discussed by *fujaha* and many modern Islamic scholars have permitted or prohibited copyright laws by taking this basic concept. Also many of the scholars have stated that something intangible can be subject of sale by quoting *ahadith*. Like *hadith* of Sahl bin Sad As-Saidi where memorization of part of

Quran was taken as *mahr* and *hadith* of Abu Said when *sahaba* took money while doing treatment from portion of Quran. Also analogy has been made by taking remuneration for teaching Quran. Similarly other evidences are made by the proponents that suggest that it is possible to take benefit from something intangible. However copyright is more comprehensive than this. It does not just allow sale of right but it gives this right exclusively to author and prohibit others from doing so without the permission of author. The evidence quoted gives justification for taking remuneration or benefit from intangible thing but it nowhere suggests that intangible thing becomes the exclusive ownership of the person.

Also many of the scholars have justified copyright by terming it prevalent custom. However facts in Pakistan show it otherwise. Many of the scholars have justified it under the doctrine of *maslaha* or public interest and it seems more logical. However it needs to be determined if international treaties are in the interest of a developing state like Pakistan and if it is not then can Pakistan survive in isolation in this global world? It is beyond the scope of a person to determine or conclude an interest of society only an institution or court can determine this.

Moreover copyright has other features that are distinctive from property. Though many of the scholars have justified copyright laws, very few of them have discussed related issues such as the issue that copyright exists only for a limited time period after the death of creator, whereas *mal* in Islam is perpetual; some of the scholars have termed infringement of copyright as theft though they have not explained why maximum punishment of theft is not awarded to theft of copyright. *Zakatability* of copyright goods is also discussed by couple of modern scholars. The relationship between author and

publisher, and status of translator is another important aspect which is discussed by very few of the scholars.

Though Copyrights are justified by many of the scholars, only few of the scholars have gone into depth while justifying them. The arguments advanced for justifying copyrights from Islamic perspective are highly inadequate. As long as the issue is not thoroughly discussed by proper Islamic legal principles in the good interest of the society it will remain open to debate.

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